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MEMORANDUM

To: The Honorable Patrick J. Leahy
From: The American Immigration Lawyers Association
Date: July 16, 2015
Re: Comments on S. 1501

The American Immigration Lawyers Association ("AILA") respectfully offers its comments to S. 1501 – American Job Creation and Investment Promotion Reform Act of 2015. These comments have been prepared by the AILA EB-5 Committee ("Committee").

Committee members have represented thousands of alien entrepreneurs as well as most of the active regional centers in the EB-5 Program. The Committee has provided comments to prior EB-5 bills as well as to prior proposed guidance of the U.S. Citizenship and Immigration Services ("USCIS"). The Committee is pleased to offer its comments to S. 1501 to assist the Senate Judiciary Committee in passing a bill that would extend the EB-5 Program and introduce important integrity measures.

In this memorandum, "section" refers to sections of S. 1501. "Subparagraph" refers to subparagraphs to be added at the end of current Section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)) as proposed in S. 1501.

Below is a summary of the key points, in the order of priority:

1. **Effective date provision, Section 2(c):**

The Committee is concerned about the lack of clarity in the effective date provision of Section 2(c) given the sweeping changes proposed in Section 2. As of 2Q 2015, 13,526 Form I-526 petitions are pending along with 334 Form I-924 applications. If new rules are made effective upon enactment, the vast majority of pending petitions and applications are likely to be denied. The patent unfairness of this result is amplified by current USCIS processing times of over 12 months on both I-526 petitions and I-924 applications, as these filings represent petitions and applications prepared under current rules well over a year ago, and in some cases several years ago. Accordingly, we urge grandfathering of

all EB-5 petitions and applications pending as of the effective date, as well as any filings associated with such pending petitions and applications, including I-526 petitions and I-829 petitions filed after the effective date. Please see **Comment 52** and **Comment 63** in the attached.

Relatedly, S. 1501 currently does not require the Secretary of Homeland Security to promulgate implementing regulations. The Committee recommends that S. 1501 require rulemaking no later than 180 days after the effective date. Please see **Comment 52**.

2. Terminations, revocations, denials in "unreviewable discretion":

The Committee is troubled by the recurring instances in S. 1501 permitting the Secretary of Homeland Security to, in his or her unreviewable discretion:

- terminate regional centers (Section 2(b), adding subparagraphs (H)((iv), (I)(iv));
- terminate third-party promoter participation (Section 2(b), adding subparagraph (K)(ii)); and
- deny or revoke petitions seeking EB-5 classification (Section 2(b), adding subparagraph (N)(i)).

No due process is afforded to the adversely affected party. Fundamental notions of fairness in our laws require the government to present evidence to support its findings, provide an opportunity to respond to such findings, and allow for appeal and judicial review of adverse determinations. The Committee urges you to require due process before any termination, denial or revocation. Please see **Comment 27** and referenced **Appendix 2** in the attached.

3. Indirect job creation limitations, Section 2:

The proposed limits to indirect job creation are difficult to unpack and understand, but the Committee's understanding is that they would render nearly all the EB-5 projects structured under current rules and policy ineligible. The Committee understands that S. 1501may be in the process of amendment. In the amended bill, the Committee recommends that 90% limit on indirect job creation be struck altogether as its application would have haphazard results. First, "direct" jobs in the sense of jobs held by the new commercial enterprise are rare in the EB-5 Program. Typically, new commercial enterprises are not operators of job creating businesses, but rather funding vehicles for job creating businesses. Even where the new commercial enterprise is an operator/employer, for construction projects of less than 2 years in duration, USCIS currently prohibits counting direct jobs as a matter of policy. Accordingly, the universe of projects with any "direct" jobs is negligible.

The rule capping job creation attributable to non-EB-5 capital at 30% is similarly arbitrary with haphazard outcomes. Projects that happen to have high input-output model multipliers have less dependence on non-EB-5 capital, and thus may successfully structure a project under this rule. However, projects with lower multipliers may not be viable because they would need a higher percentage of jobs from non-EB-5 capital than permitted under a 30% limit. There is no policy rationale served by such arbitrary results.

With respect to the rule requiring 50% of all the required job creation to take place within an area surrounding the targeted employment area, the Committee observes that this rule is consistent with the original Congressional intent to foster regional productivity. However, the Committee further observes that a number of successful EB-5 projects have counted job creation impacts from specialized equipment purchases outside the project region. Jobs are certainly created by such purchases and USCIS regulations refer to "positive impact on the regional or national economy" (8 C.F.R. § 204.6(m)(3)(iv)). Accordingly, support exists for counting all the jobs created outside the immediate project region.

To the extent that all these limits to indirect job creation stem from uncertainty about the validity of methodologies used to estimate indirect job creation, please refer to our letter to you dated June 3, 2015 regarding indirect job creation methodologies generally. This letter provides the history of input-output models and their wide-spread use by governments, universities, and private actors alike to estimate the economic impact of proposed projects. Notwithstanding the validity of input-out models as a tool for measuring job creation impacts, USCIS also places various restrictions limiting indirect job creation as a matter of policy. Such policy limits include disallowing direct construction jobs where the construction phase lasts under two years and defining permissible inputs to job creation modeling. Accordingly, the job creation methodologies typically used in the EB-5 Program are not only valid and reliable, but represent conservative estimates of actual job creation. Please see **Comment 6** and referenced Appendix 1 in the attached.

4. High unemployment area definition, Section 4(c):

As a Committee of lawyers and not proponents of a particular policy viewpoint, we decline critiquing the proposed single-census tract definition of "high unemployment area" in S. 1501 from a policy standpoint. However, we note that the U.S. Bureau of Labor Statistics uses place of residence to measure unemployment. A new project will draw from workers residing in the surrounding commuter shed, typically a multi-county area, not limited to the project census tract. It will only be incidentally the case that such a new project will employ workers who reside in the project census tract, an area the U.S.

Department of Commerce states as optimally having only 4,000 people. Accordingly, siting a project on a high unemployment census tract does not correlate with job creation at that particular census tract, nor does it necessarily ameliorate high unemployment in the relevant multi-county commuter geography. The Committee also notes that the 101st Congress creating the EB-5 visa category referred to high unemployment areas as including "pockets of high unemployment." There seems to have been recognition that an area defined as high unemployment may be so designated, even if only pockets and not the entire area experienced high unemployment. Please see **Comment 60**.

5. Advance approval of investments ("preapprovals"), Section 2(b):

Advance approvals of investments hold the promise of predictability and efficiency in adjudication of associated Form I-526 petitions. However, given that S. 1501 would make preapproval applications mandatory in advance of I-526 petition filings by individual investors, premium processing is essential to avoid projects from languishing and suffering potential material changes before investors may begin filing I-526 petitions. Delay impairs project viability from both commercial and USCIS eligibility standpoints. Accordingly, we recommend drafting legislation that would require USCIS to enable premium processing upon the effective date and provide recourse to applicants when USCIS fails to adjudicate applications within the required window. Please see **Comment 9**, *et seq*.

6. Deference, Section 2(c), adding subparagraph (F)(ii):

Although USCIS has memorialized its policy to accord deference to prior favorable adjudications in the May 2013 USCIS Memorandum, the Committee reports that the USCIS continues to issue requests for evidence and notices of intent to deny petitions based on previously approved projects. Failure to accord deference impairs predictability, reasonable reliance on past government action, and wastes both government and private resources. The Committee urges adopting robust statutory provisions to bind USCIS to prior determinations in the absence of the exceptions set forth in the May 2013 USCIS Memorandum: fraud, material change, legal deficiency. Exceptions to deference should be as clearly defined as possible and strictly applied. The Committee recommends adopting the statutory provisions in H.R. 616 on this point. Please see our **Comment 16**.

7. Permanent Reauthorization, Section 2(b):

Given the extensive nature of the proposed changes, a mere five-year extension makes little sense. Significant changes to program administration as well as regional center business model restructuring will have taken place only to potentially experience yet more changes after five years. With visa backlogs, investors who first filed under the new law may not have reached removal of conditions before the law sunsets and different laws enacted. Permanent

reauthorization is a key factor in growing an EB-5 Program that is predictable, credible, and attractive to risk-averse actors.

8. **Overbreadth in certification requirements, Section 2(b), adding subparagraphs (G), (H), (I):**

   The Committee understands the importance of integrity measures and reports that the industry embraces rigorous oversight. Integrity measures, however, should take into account practical limitations, regulate only those individuals substantially involved in a regional center or new commercial enterprise, and not impose strict liability for third party acts over which a regional center or new commercial enterprise has no control. When coupled with the sanction of termination in the Secretary's unreviewable discretion, the path to compliance under S. 1501 contemplates is narrow and unforgiving. We recommend in general inserting the concept that the certifying regional center or new commercial enterprise is making required representations "to the best of the certifier's knowledge, after reasonable investigation." This is language already drafted into the bill in subparagraph (I), relating to certain securities-related certifications. Please see **Comments 23 to 41**.

9. **Vagueness in new source of funds rules:**

   The Committee does not object to new source of funds limitations in concept. However, some new provisions are vague. For example, loans are required to be from "reputable banks," but it is unclear how a petitioner would identify such banks. Similarly, "fees associated with the alien's investment" must be sourced, but it is unclear which fees are covered, as numerous and relatively insignificant fees, such as translation fees, may be associated with the investment. Moreover, valid transactions are precluded, such as gifts from those not enumerated as qualifying relatives in S. 1501. In-laws, domestic partners, aunts and uncles, as examples, are excluded from gifting assets to the investor, yet there is no rationale for such a limit. Please see our **Comments 45**, *et seq.*

The Committee applauds the numerous ameliorative provisions in Sections 3 and 4 of S. 1501. These provisions would permit filing a petition to remove conditions after two years of sustained investment, allow concurrent filings of adjustment of status applications, include the EB-5 preference category in the reprieve provided under Section 245(k), and provide one-time protection for aged-out derivatives. The Committee also applauds protective provisions under Section 2(b), proposed subparagraph (M) for investors affiliated with terminated regional centers. We support your efforts to protect good faith investors and urge you to ensure these provisions survive in the final law reauthorizing the EB-5 Program.

Conclusion

The Committee is grateful for the opportunity to present its views. The EB-5 Program allowed investment and job creation in the United States when domestic capital was constrained. Reform is welcome to attract high quality participants as well as to deter and detect threats to program integrity. These reforms should be implemented consistent with our treasured notions of fundamental fairness and due process.

114TH CONGRESS
1ST SESSION

S. ▮ ▮

To promote and reform foreign capital investment and job creation in American communities.

IN THE SENATE OF THE UNITED STATES

▮▮▮▮▮▮▮▮▮▮

Mr. LEAHY (for himself and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on ▮▮▮▮▮▮▮▮▮▮

A BILL

To promote and reform foreign capital investment and job creation in American communities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''American Job Creation and Investment Promotion Reform Act of 2015''.

SEC. 2. REAUTHORIZATION OF EB–5 REGIONAL CENTER PROGRAM.

(a) REPEAL.—Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related

Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note) is repealed.

(b) AUTHORIZATION.—Section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)) is amended by adding at the end the following:

''(E) REGIONAL CENTER PROGRAM.—

''(i) IN GENERAL.—Visas under this paragraph shall be made available through September 30, 2020, to qualified immigrants (and the eligible spouse and children of such immigrants) participating in a program implementing this paragraph that involves a regional center in the United States, which has been designated by the Secretary of Homeland Security on the basis of a proposal for the promotion of economic growth, including prospective job creation and increased domestic capital investment.

''(ii) PRIORITY.—In processing petitions under section 204(a)(1)(H) for classification under this paragraph, the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under this subparagraph. Notwith-

Comment [AILA1]: COMMENT:

All current legislative proposals in the House (HR 616, HR 2131) as well as S. 744 and Senate Amendment 1455 from the 113th Congress provide for permanent authorization of the EB-5 Regional Center Program.

Given the clear Congressional expression of the desirability of permanent authorization, and also given the extensive reworking of the Program S. 1501, if enacted, would put in place, we do not see the rationale for a mere 5 year reauthorization.

standing subsection (e), immigrant visas made available under this paragraph may be issued to such aliens in an order that takes into account any priority accorded under this clause.

''(iii) ESTABLISHMENT OF A REGIONAL CENTER.—A regional center shall operate within a defined geographic area, which shall be described in the proposal and be consistent with the purpose of concentrating pooled investment within the defined and limited geographic area. The proposal to establish a regional center shall demonstrate that the pooled investment will have a significant economic impact on such geographic area, and shall include—

''(I) reasonable predictions, supported by economically and statistically valid forecasting tools, concerning the amount of investment that will be pooled, the kinds of commercial enterprises that will receive such investments, verifiable details of the jobs that will be created directly or indirectly as a result of such invest-

ments, and other positive economic effects such investments will have; and

''(II) a description of the policies and procedures in place reasonably designed to monitor associated commercial enterprises to ensure compliance with all laws, regulations, and executive orders of the United States.

''(iv) INDIRECT JOB CREATION.—The Secretary of Homeland Security shall permit aliens seeking admission under this paragraph to satisfy up to 90 percent of the requirements under subparagraph (A)(ii) with jobs that are estimated to be created indirectly through investment under this paragraph in accordance with this subparagraph.

''(v) COMPLIANCE.—

''(I) IN GENERAL.—In determining compliance with subparagraph (A)(ii), the Secretary of Homeland Security shall—

''(aa) permit aliens seeking admission under this paragraph to rely on economically and sta-

Comment [AILA2]: STRIKE (iv) or REDRAFT:

All jobs calculated or modeled for purposes of measuring the economic impact of an EB-5 project are "indirect" under USCIS guidelines. This understanding was confirmed in the 6/5/2015 USCIS stakeholders call. The Committee reports that based on its collective, vast experience representing large numbers of regional centers, developers, funds, as well as investors, that there are negligible numbers of "direct" jobs in the Regional Center Program, where "direct jobs" refer to jobs held by new commercial enterprise employees. Virtually all job creation as projected by input/output models for any project – whether an EB-5 project or a government-sponsored project – measures "indirect" impacts only, and not jobs directly issuing from a particular entity as employer.

Example: A project has 100 investors, requires 1000 jobs. Under clause (iv), only up to 900 can be "indirect;" meaning at least 100 has to be "direct." This is not a problem if the drafters mean "direct" in the economists' sense (i.e. jobs created in the specific initial industry, and not in the USCIS sense jobs created by the new commercial enterprise).

Clause (iv) does present a problem if drafters mean to require 10% "direct" jobs in the USCIS sense because EB-5 new commercial enterprises are not operators or employers of direct hires. They are investment vehicles where investor capital is pooled to be deployed (typically in the form of a loan and at times in the form of equity) into a job creating entity. The job creating entity, typically a developer, is not necessarily an employer of the "direct" jobs in the USCIS sense, either. Particularly in the construction project context, where EB-5 capital is usually deployed, the job creating entity spends the EB-5 capital on hiring a construction contractor, engineers, and other construction-related firms who are the direct employers.

RECOMMENDATION: STRIKE CLAUSE (IV) FOR INCOMPATIBILITY WITH USCIS DEFINITION OF "DIRECT" JOBS AND ROLE OF NEW COMMERCIAL ENTERPRISE.

ALTERNATIVE PROPOSAL:
"… under subparagraph (A)(ii) with jobs that are estimated to be "INDIRECT OR INDUCED" ACCORDING TO ECONOMICALLY AND STATISTICALLY VALID METHODOLOGIES. AT LEAST 10 PERCENT OF THE REQUIREMENTS UNDER SUBPARAGRAPH (A)(ii) MUST BE SATISFIED WITH JOBS THAT ARE ESTIMATED TO BE CREATED "DIRECTLY" ACCORDING TO SUCH METHODOLOGIES."

tistically valid methodologies for determining the number of jobs created by the program, including, consistent with this subparagraph, jobs estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, and increased domestic capital investment resulting from the program; and

''(bb) verify that the jobs described in item (aa) meet the requirements under this subparagraph by using a methodology that has been accepted by the Bureau of Economic Analysis of the Department of Commerce to be economically and statistically valid for such purposes.

''(II) PROJECTS INVOLVING CAPITAL CONTRIBUTION FROM NON-ALIEN ENTREPRENEURS.—

Comment [AILA3]: CLARIFY RE: INTENT.

COMMENT:
We have researched into whether the BEA has a known set of methodologies that it "accepts" or has "accepted". To our knowledge and research, no such set exists. Accordingly, it is unclear how regional centers would comply with item.

RECOMMENDATION: STRIKE ITEM (bb) FOR COMPLIANCE IMPOSSIBILITY.

''(aa) CREDIT FOR JOB CREATION.—Alien entrepreneurs may accrue credit for job creation based on capital investment provided by non-alien entrepreneurs only for the percentage of total jobs created that is equal to the percentage of total capital investment provided by such non-alien entrepreneurs in the commercial enterprise.

''(bb) LIMITATION.—The percentage of jobs created for which alien entrepreneurs may accrue credit under item (aa) based on such non-alien entrepreneur capital contribution may not exceed 30 percent of all jobs created even if such contribution exceeds 30 percent.

''(III) INELIGIBLE JOBS.—In determining compliance with the job creation requirements under subparagraph (A)(ii), the Secretary may not include jobs estimated to be created

Comment [AILA4]: CLARIFY:
The word "accrue" is ambiguous in this context.

Comment [AILA5]: CLARIFY:
COMMENT:
Please note that non-EB-5 capital is not generally provided directly to, or "in the commercial enterprise." Rather, non-EB-5 capital is pooled with EB-5 capital in one or more of the job creating entities: for example, the developer and/or affiliates.
RECOMMENDATION: REDRAFT "IN THE COMMERCIAL ENTERPRISE" TO "IN THE CAPITAL INVESTMENT PROJECT."

Comment [AILA6]: COMMENT:
The intent behind this limitation is unclear. Please clarify so that we may better understand and address the concerns.
Any limits on indirect job creation is a matter of policy, outside the purview of the Committee. However, the Committee observes the following:

(1) As previously reported in a letter from the Committee to the Honorable Senator Leahy dated June 3, 2015 and attached here as **APPENDIX 1**, the use of input/output models is recognized as valid means of measuring project job creation impacts used by governments, universities, and private actors alike.

(2) Current USCIS regulations at 8 CFR 204.6(g)(2) as USCIS interprets, permit job creation from non EB-5 capital to be credited to EB-5 investors. The preamble to the final EB-5 regulations published in November 1991 shows USCIS deliberately liberalized job creation credit, allowing employment created as a result of non-EB-5 investment to be allocated only to alien entrepreneurs. The sole accompanying requirement is that "all capital invested is identified and all invested capital has been derived by lawful means."

(3) From the operation of the proposed 30% rule, it would appear that projects bound by relatively low multipliers, as a result of the particular industry, geography, or both, would be no longer be viable. Below a minimum threshold multiplier, EB-5 capital is insufficient for the number of jobs required per investor, and must rely on non-EB-5 capital. If job creation credit from such non-EB-5 capital is limited per (bb), low multiplier projects requiring greater than 30% job allocation from non-EB-5 capital could not proceed.

(4) Infrastructure projects typically have a high level of non-EB-5, governmental funding. Significant numbers of past projects funded by partnership of municipal and EB-5 funds would not be viable under this rule.

(5) USCIS imposes several limitations on indirect job creation as a matter of policy, reducing the number of jobs that are still valid from a purely econometric standpoint. Accordingly, the final approved indirect job count already reflects policy oversight and downward adjustment required by USCIS policy.

RECOMMENDATION: CLARIFY INTENT. ALTERNATIVELY, STRIKE SUBCLAUSE (II) AS UNWORKABLY RESTRICTIVE.

under a tenant-occupancy methodology.

''(vi) AMENDMENTS.—The Secretary of Homeland Security shall—

''(I) require approved regional centers to give advance notice to the Secretary of significant proposed changes to their organizational structure, ownership, or administration, including the sale or rental of such centers;

''(II) approve or disapprove the changes referred to in subclause (I) before any such proposed changes take effect; and

''(III) approve the changes referred to in subclause (I) only after—

''(aa) notice of any such proposed changes are made publicly available through a publicly accessible website of U.S. Citizenship and Immigration Services for a period of not fewer than 30 days; and

Comment [AILA7]: STRIKE:
USCIS has published guidance seeking to identify instances where EB-5 capital has sufficient nexus with tenant activity, where relocated jobs would also be excluded. This guidance has proved to be sufficient thus far in limiting jobs created by tenant activity with insufficient nexus to EB-5 capital. The blanket prohibition in subclause (III), therefore, appears without reason and creates needless ambiguity as it does not define "tenant-occupancy methodology." This is not a plain meaning term, nor a term with definition in the statute, regulations, or even in the comprehensive May 2013 Memorandum, but rather a term that first appeared in 2012 in USCIS requests for evidence and three (3) 2012 USCIS memos released in response to strong stakeholder criticism of new policy applied retroactively.

Comment [AILA8]: CLARIFY:

(1) What is "rental"?
(2) What is the Impact on pending preapproval applications and I-526s, and on post-sale preapproval applications? Would they be required to await approval?

RECOMMENDATION: Expedited processing must be required if approval is required before preapproval applications can be approved or filed. Otherwise, projects would suffer indefinite delay pending outcome of an organizational amendment.

''(bb) the Secretary determines that the regional center would remain compliant with this subparagraph and with subparagraph (H).

''(F) BUSINESS PLANS FOR REGIONAL CENTER INVESTMENTS.—

''(i) APPLICATION FOR APPROVAL OF INVESTMENT IN COMMERCIAL ENTERPRISE.—A commercial enterprise associated with a regional center shall file an application with, and obtain approval from, the Secretary of Homeland Security for each particular investment offering through the commercial enterprise to aliens seeking classification under this paragraph, which shall include—

''(I) a comprehensive business plan for a specific capital investment project;

''(II) a credible economic analysis regarding estimated job creation that is based upon economically and statistically valid methodologies;

Comment [AILA9]: COMMENT:

We assume by "business plans" the drafters refer to Form I-924 applications for exemplar I-526 – i.e. full project preapproval including organizational documents.

Generally, the Committee believes that preapproval of projects is an excellent device for promoting predictability and efficiency in future related adjudications. The Committee has provided extensive comments on this process in 2011. Please see **Appendix 3**.

Because S. 1501 would make preapprovals mandatory, as opposed to optional as proposed in H.R. 616, it is imperative that USCIS be required to premium process and to strictly adhere to premium processing timeframes. Administrative delays would impair the feasibility of generating EB-5 capital for projects, as a preapprovals would function as a condition precedent to marketing, which can take months to procure investors. On the necessity for speed and other suggestions for program improvements, please see letter from the Committee Chair to the USCIS Director dated December 21, 2012 at **Appendix 4**.

Finally, deference to an approved business plan is essential and should be robustly required by statute. Please see further comment below.

Comment [AILA10]: CLARIFY:

Please make it clear either in subparagraph (E) or (F) that a business plan (or preapproval application) may be made together with an initial regional center designation proposal.

Comment [AILA11]: COMMENT:

Please note that the current form I-924 is a regional center filing, not a commercial enterprise filing. USCIS will need to publish modify form.

RECOMMENDATION: REQUIRE USCIS PROMULGATE REGULATIONS WITHIN 6 MONTHS OF EFFECTIVE DATE, INCLUDING NEW FORMS.

In the interim, USCIS should publish notice that the current I-924 signed by the regional center will be accepted after enactment.

''(III) documents filed with the Securities and Exchange Commission under the Securities Act of 1933 (15 U.S.C. 77a et seq.);

''(IV) investment and offering documents, including subscription, investment, partnership, and operating agreements, private placement memoranda, term sheets, management biographies, the description of the business plan to be provided to potential alien entrepreneurs, and any marketing materials used or prepared for use in connection with the offering by the regional center or any associated commercial enterprise, which shall contain references, as appropriate, to any—

''(aa) investment risks associated with the new commercial enterprise and any other business subsequently receiving investment capital from the new commercial enterprise;

Comment [AILA12]: COMMENT:

Please note that marketing material are created and revised typically throughout the life of the offering. Accordingly, any marketing material included with a preapproval application under subparagraph (F) will not include all, final marketing material in all instances.

''(bb) conflicts of interest that currently exist or may arise among the regional center, new commercial enterprise, other business subsequently receiving investment capital from the new commercial enterprise, or the principals of the aforementioned entities;

''(cc) the name and contact information of any person that has received or the commercial enterprise knows will receive any fees or transaction-based compensation in connection with the investment, and a description of the services performed or to be performed by such person which entitle them to the fees or transaction-based compensation; and

''(dd) any pending litigation or bankruptcy or adverse judgments during the most recent 10-year period affecting the regional center, new commercial enter-

prise, any other business subsequently receiving investment capital from the new commercial enterprise, or any other enterprise in which any principal of the aforementioned entities held majority ownership at the time;

''(V) a description of the policies and procedures reasonably designed to ensure that the commercial enterprise, its agents, employees, and attorneys, and any persons in active concert or participation with the commercial enterprise, comply with the securities laws of the United States in connection with the offer, purchase, or sale of its securities;

''(VI) a certification that the commercial enterprise and its agents, employees, and attorneys, and any persons in active concert or participation with the commercial enterprise, are in compliance with the securities laws of the United States in connec-

Comment [AILA13]: ADD AFTER "securities":

"insofar as each such person is subject to the securities laws of the United States."

tion with the offer, purchase, or sale of its securities; and

''(VII) for a capital investment in a targeted employment area, a credible economic analysis regarding estimated job creation that is likely to occur—

''(aa) if the targeted employment area is located within a combined statistical area or a metropolitan statistical area, in the combined statistical area or metropolitan statistical area; or

''(bb) if the targeted employment area is located outside of an area described in item (aa), in any county that is included in the targeted employment area and counties adjacent to the targeted employment area.

''(ii) EFFECT OF APPROVAL OF BUSINESS PLAN FOR INVESTMENT IN REGIONAL CENTER COMMERCIAL ENTERPRISE.—The approval of an application under this subparagraph shall be binding for purposes of

Comment [AILA14]: ADD AFTER "securities":

"insofar as each such person is subject to the securities laws of the United States."

Comment [AILA15]: COMMENT:

The intent of subclause (VII) appears to favor projects that have most of their job creation impact within the project's immediate region. This is consistent with the original intent of P.L. 102-395, as amended.

However, the Committee notes that there are occasionally projects requiring specialized equipment manufactured outside the project region, such as specialized medical or gaming equipment. Those purchases certainly create final demand and jobs at those industries, even though they take place outside the project region.

Comment [AILA16]: ADD AFTER "shall be binding":

"and the Director (as later defined in this paragraph) shall not revisit such prior approval"

COMMENT: USCIS has had an unfortunate history of failing to accord deference to prior favorable determinations, adopting new policies midstream to pending cases. The Committee observes this failure to accord deference continues under the IPO notwithstanding memorialization of the deference policy in the May 2013 Memorandum. Accordingly, the new law should robustly set forth a statutory requirement to accord deference unless an exception applies.

Deference should be afforded to prior favorable determinations of Form I-526 as well as Form I-829. The same rationale for deference in the preapproval context applies in the context of other EB-5 filings. See treatment of deference in H.R. 616 requiring deference to previously approved petitions. (H.R. 616, Section 2(a), page 7.)

the adjudication of subsequent petitions seeking classification under this paragraph by immigrants investing in the same commercial enterprise concerning the same economic activity, and of petitions filed under section 216A, unless the Secretary of Homeland Security determines that there is evidence of fraud, misrepresentation, criminal misuse, a threat to public safety or national security, a material change that affects the approved economic model, other evidence affecting program eligibility that was not disclosed by the petitioner during the approval process, or a material mistake of law or fact in the prior adjudication.

''(iii) CONSIDERATION OF FRAUDULENT OR OTHER CRIMINAL ACTIVITY IN ESTABLISHING ELIGIBILITY CRITERIA.—

''(I) IN GENERAL.—The Secretary of Homeland Security shall consider the potential for fraud, misrepresentation, criminal misuse, and threats to public safety or national se-

Comment [AILA17]: AMEND to "applicant."

Comment [AILA18]: AMEND to "objective".

COMMENT: The substitution of "material" for "objective" as used in the May 2013 Memo inserts hazardous ambiguity. The term "objective" is keyed to other USCIS guidance on the kinds of errors that can justify reversing prior approvals, i.e. errors upon which that a beneficiary may not reasonably rely because the errors are objective and obvious. "Material" is an ambiguous term and invites subjectivity, generally and in this instance. What is meant by "material mistake of law or fact"? Reasonable reliance on prior approvals would be upset if prior approvals can be overturned on such undefined ground.

Comment [AILA19]: ADD:

"The Secretary of Homeland Security shall, prior to issuing any decision that does not accord deference to an approval of an application under this subparagraph, shall provide the basis for its findings and permit the applicant to present evidence to affirm the prior approval."

curity in establishing eligibility criteria under this subparagraph.

''(II) GROUNDS FOR DENIAL OR REVOCATION.—The Secretary shall deny or revoke the approval of any business plan application under this subparagraph with any particular investment or business arrangement that, in the Secretary's unreviewable discretion—

''(aa) presents a threat to public safety or national security; or

''(bb) presents a significant risk of criminal misuse, fraud, or abuse, including arrangements that involve self-dealing or any other inherent conflict of interest between potential alien entrepreneurs and the principals of a regional center or a regional center associated commercial enterprise.

''(iv) SITE VISITS.—The Secretary shall perform at least 1 site visit to each

Comment [AILA20]: COMMENT:

The Committee is deeply troubled by the instances of denials, revocations and other unfavorable actions in the Secretary's or the Director's unreviewable discretion in S. 1501.

Fundamental notions of due process in our laws require the government to present evidence to support its findings, an opportunity to respond to such findings, an opportunity for an appeal to an objective tribunal.

Please see attached a full brief on this matter attached here as **APPENDIX 2**.

regional center associated commercial enterprise in accordance with section 216A(c)(1)(C).

''(v) PREMIUM PROCESSING OPTION.—The Secretary shall establish a process for premium processing of business plan applications under this subparagraph related to investment in a regional center commercial enterprise, including making available the expeditious execution of a site visit described in clause (iv), which may include an opportunity for the applicant to address and cure any deficiencies identified by the Secretary in the applicant's business plan, investment documents, or statement regarding job creation prior to a final determination. The Secretary shall impose a fee for the use of the process described in this clause sufficient to recover the costs of its administration.

''(vi) APPROVAL OF BUSINESS PLAN IN A TARGETED EMPLOYMENT AREA.—For a capital investment in a designated targeted employment area, at least 50 percent of the estimated job creation intended to

Comment [AILA21]: COMMENT:

We note that proposed amendments requiring site visits under new section 216A(c)(1)(C) will be effective 2 years after enactment under section 3(b)(2).

However, when effective, under section 216A(c)(1)(C), USCIS site visits to the job creating entity is contemplated "any time after an application for approval of investment in a commercial enterprise is filed under section 203(b)(5)(F)." While the Committee reports that the industry embraces greater oversight, we are concerned that the conclusion of such site visit will be a condition to preapproval. We anticipate significant backlog to result.

Recommendation: add at the end of section 216A(c)(1)(C): "and before a petition is approved under section 216(A) but within the two-year period of conditional residency."

Comment [AILA22]: COMMENT:

As long as preapprovals are required in advance of any I-526 petition filing, premium processing is critical as is the USCIS's execution of timely adjudication under premium processing.

Please also see our Comment 9.

ADD AT THE END: "The Secretary shall permit premium processing under this clause (v) on the effective date. Special recourse to the Citizenship and Immigration Services Ombudsman shall be available to the business plan applicant when the Secretary fails to adjudicate business plan applications under this clause (v) within 60 days or issues frivolous requests for evidence."

form the basis of the job creation requirement under subparagraph (A)(ii) shall be expected to occur within an area specified in subparagraph (F)(i)(VII). If the estimated job creation in such area is below 50 percent, the total number of jobs created by the capital investment for which alien entrepreneurs may receive credit shall be limited to the number at which 50 percent of the job creation requirement occurs within an area described in clause (i)(VII).

''(G) REGIONAL CENTER ANNUAL STATEMENTS.—

''(i) IN GENERAL.—Each regional center designated under subparagraph (E) shall annually submit, to the Director of U.S. Citizenship and Immigration Services (referred to in this subparagraph as the 'Director'), in a manner prescribed by the Secretary of Homeland Security, a statement, including—

''(I) a certification by the regional center that it remains in compliance with clauses (i) and (ii) of subparagraph (H);

Comment [AILA23]: COMMENT:

Generally, the Committee recommends that certification rules reflect the impracticality, if not impossibility, of accurately reporting third party conduct with absolutely certainty. Given that to be the case whenever a party is required to make representations, the Committee recommends embedding the concept of "reasonable efforts" in due diligence. This impracticality of perfect third party control is yet another reason why termination, or any other adverse government action without due process is improper.

Finally, given the extensive new requirements under subparagraphs (G), (H), (I), and (K), the effective date for these provisions should require compliance for starting the full fiscal year following enactment. Currently under Section 2(c) of S. 1501, it would appear that the certification requirements are effective upon enactment.

Please see our comment to Section 2(c).

Comment [AILA24]: ADD after "statement" (per subparagraph (I)(ii)(II)):

", to the best of the certifier's knowledge, after reasonable investigation,"

''(II) a certification by the regional center described in subparagraph (I)(ii)(II);

''(III) a certification by the regional center that it is in compliance with subparagraph (K)(iii);

''(IV) a description of any pending litigation or bankruptcy proceedings, or litigation or bankruptcy proceedings resolved during the preceding fiscal year, involving the regional center or an associated commercial enterprise;

''(V) an accounting of all foreign investor money invested in the regional center and its associated commercial enterprises; and

''(VI) for each new commercial enterprise associated with the regional center—

''(aa) an accounting of the aggregate capital invested in the new commercial enterprise by alien entrepreneurs under this paragraph for each capital invest-

ment project being undertaken by the new commercial enterprise;

''(bb) a description of how such capital is being used to execute each capital investment project in the approved business plan or plans;

''(cc) evidence that 100 percent of such capital has been irrevocably committed to each capital investment project;

''(dd) detailed evidence of the progress made toward the completion of each capital investment project;

''(ee) an accounting of the aggregate direct jobs created or preserved;

''(ff) a description of all funds, including administrative, loan monitoring, or loan management fees, in addition to investor capital collected from alien entrepreneurs by any party in relation to the investment or participation

Comment [AILA25]: COMMENT:

As a practical matter, it may be impossible for a regional center to know all the fees paid by an investor to various parties.

in the regional center program described in subparagraph (E), the entities that received such funds, and the purpose for which such funds were collected;

''(gg) any documentation referred to in subparagraph (F)(i)(IV) if there has been a material change during the preceding fiscal year; and

''(hh) a certification by the regional center and associated commercial enterprise that such statements are accurate.

''(ii) AMENDMENT OF ANNUAL STATEMENTS.—The Director—

''(I) shall require the regional center to amend or supplement an annual statement required under clause (i) if the Director determines that such statement is deficient; and

''(II) may require the regional center to amend or supplement such annual statement if the Director de-

Comment [AILA26]: COMMENT:

The same reprieve given to securities law-related certifications under subparagraph (I) should be permitted here. Subparagraph (I)(ii)(III) reads:

"(III) may permit the regional center to amend or supplement such annual statement if the regional center through its due diligence, discovered after submitting the annual statement under clause (i) that the regional center or any party associated with the regional center was not in compliance with any certification under clause (i), the regional center shall…"

termines that such an amendment or supplement is appropriate.

''(iii) SANCTIONS.—

''(I) EFFECT OF VIOLATION.—If the Director determines that a regional center or other individual affiliated with a regional center, including an individual affiliated with an associated commercial enterprise, and any legal representative of such entities, has violated any certification under clause (i) or that the regional center is conducting itself in a manner inconsistent with its designation, including any willful and material deviation by commercial enterprises associated with the regional center from any approved business plan for such commercial enterprises, the Director shall sanction the violating entity or individual under subclause (II).

''(II) AUTHORIZED SANCTIONS.—The Director shall establish a graduated set of sanctions based on the severity of the violations referred to in

Comment [AILA27]: COMMENT:

Fundamental notions of due process in our laws require the government to present evidence to support its findings, an opportunity to respond to such findings, and an opportunity for an appeal to an objective tribunal.

Please see attached a full brief on this matter attached here as **APPENDIX 2**.

Comment [AILA28]: STRIKE "and any legal representative":

Comment: There is no certification made by a legal representative under clause (i).

Comment [AILA29]: AMEND TO ADD GOOD FAITH EXCEPTION:

", unless such violation arises through no fault of the regional center or the new commercial enterprise, as applicable, each acting in good faith,"

Comment: Given the extensive nature of the certifications, a good faith reprieve, the applicability of which the Director determines, seems appropriate.

Comment [AILA30]: CLARIFY:

It is unclear what "willful" intends to capture.

The Committee propose different language to clarify intent. For example, after "including":
"any material deviation by commercial enterprises associated with the regional center from any approved business plan for such commercial enterprises that is inconsistent with fiduciary obligations to the alien entrepreneurs participating in such commercial enterprises."

subclause (I), as determined by the Director, including—

''(aa) civil money penalties equal to not more than 10 percent of the total capital invested by alien entrepreneurs in the regional center's associated commercial enterprises, the payment of which shall not in any circumstance utilize any of such alien entrepreneurs' capital investment;

''(bb) temporary suspension from participation in the program described in subparagraph (E), which may be lifted by the Director if the individual or entity cures the alleged violation after being provided such an opportunity by the Director;

''(cc) permanent bar from program participation for 1 or more individuals associated with the regional center or an associated commercial enterprise; and

Comment [AILA31]: Comment:

This opportunity to cure must be expressly provided for all of the Director's determinations to impose sanctions in clause (iii).

''(dd) termination of regional center status.

''(H) BONA FIDES OF PERSONS ASSOCIATED WITH REGIONAL CENTERS OR REGIONAL CENTER ASSOCIATED COMMERCIAL ENTERPRISES.—

''(i) IN GENERAL.—No person shall be permitted by any regional center or regional center associated commercial enterprise to be directly or indirectly involved with the regional center or commercial enterprise as its principal, representative, administrator, owner, officer, board member, manager, executive, general partner, fiduciary, marketer, promoter, or other similar position of substantive authority for the operations, management or promotion of the regional center or commercial enterprise if—

''(I) the person has been found liable within the previous 10 years for any criminal or civil violation of any law relating to fraud or deceit, or at any time if such violation involved a civil liability in excess of $1,000,000,

Comment [AILA32]: COMMENT:

The general issue here is overbreadth.

No entity can reasonably exert control over persons "indirectly" involved with its business, particularly given the breadth of the covered types of individuals such as "marketer, promoter."

Also please note that sometimes the new commercial enterprise and the regional center are not under common control. Accordingly, due diligence failures of one party in unrelated projects should not necessarily be imputed to the other(s). For example, if a new commercial enterprise merely affiliates with a regional center which also affiliates with others, noncompliance by another, unaffiliated new commercial enterprise should not adversely affect the compliant commercial enterprise.

RECOMMENDATION: ADOPT THE STANDARD FOR BONA FIDES OF REGIONAL CENTER PRINCIPALS IN H.R. 616, SECTION 2(a)(4), page 8.

Comment [AILA33]: ADD (per subparagraph (I)(ii)(II)):

", to the best of the certifier's knowledge, after reasonable investigation,"

a criminal conviction with a term of imprisonment of more than 1 year or a criminal or civil violation of any law or agency regulation in connection with the offer, purchase, or sale of a security;

''(II) the person is subject to a final order of a State securities commission (or an agency or officer of a State who performs similar functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or an agency of or officer of a State who performs similar functions), an appropriate Federal banking agency, the Commodity Futures Trading Commission, or the National Credit Union Administration, which is based on a violation of any law or regulation that—

''(aa) prohibits fraudulent, manipulative, or deceptive conduct; or

''(bb) bars the person from—

''(AA) association with an entity regulated by such commission, authority, agency, or officer;

''(BB) engaging in the business of securities, insurance, or banking; or

''(CC) engaging in savings association or credit union activities;

''(III) there is reasonable cause to believe that the person is engaged in, has ever been engaged in, or seeks to engage in—

''(aa) any illicit trafficking in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act);

''(bb) any activity relating to espionage, sabotage, or theft of intellectual property;

‘‘(cc) any activity related to money laundering (as described in section 1956 or 1957 of title 18, United States Code);

‘‘(dd) any terrorist activity (as defined in clauses (iii) and (iv) of section 212(a)(3)(B));

‘‘(ee) any activity related to human trafficking or a human rights offense;

‘‘(ff) any activity described in section 212(a)(3)(E); or

‘‘(gg) the violation of any statute, regulation, or Executive Order regarding foreign financial transactions or foreign asset control; or

‘‘(IV) the person—

‘‘(aa) is, or during the preceding 10 years has been, included on the Department of Justice’s List of Currently Disciplined Practitioners; or

‘‘(bb) during the preceding 10 years, has received a rep-

Comment [AILA34]: COMMENT:

The Committee views subclause (IV) as too broad. If a person received censure 10 years ago but is currently in good standing, there is no reason to exclude such a person.

rimand or otherwise been publicly disciplined by a bar association of which the person is or was a member.

''(ii) STATUS OF REGIONAL CENTER PRINCIPALS.—

''(I) LAWFUL STATUS REQUIRED.—No person may be directly or indirectly involved with a regional center as its principal, administrator, owner, officer, board member, manager, executive, general partner, fiduciary, or other similar position of significant authority for the operations or management of the regional center unless the person is a national of the United States or an individual who has been lawfully admitted for permanent residence.

''(II) FOREIGN GOVERNMENTS.—No foreign government entity may be directly or indirectly involved with the ownership or administration of a regional center.

‘‘(iii) INFORMATION REQUIRED.—The Secretary shall require such attestations and information, including the submission of fingerprints or other biometrics to the Federal Bureau of Investigation, and shall perform such criminal record checks and other background checks with respect to a regional center or regional center associated commercial enterprise, and persons involved in a regional center or regional center associated commercial enterprise as described in clauses (i) and (ii), to determine whether such regional center or regional center associated commercial enterprise is in compliance with clauses (i) and (ii). The Secretary may require the information and attestations described in this clause from such regional center or regional center associated commercial enterprise, and any person involved in the regional center or regional center associated commercial enterprise, at any time on or after the date of the enactment of the American Job Creation and Investment Promotion Reform Act of 2015.

‘‘(iv) TERMINATION.—The Secretary, in the Secretary’s unreviewable discretion, shall terminate from the program under this paragraph any regional center or regional center associated commercial enterprise if the Secretary determines that—

‘‘(I) the regional center or regional center associated commercial enterprise has violated clause (i);

‘‘(II) the regional center has violated clause (ii);

‘‘(III) the regional center, a regional center associated commercial enterprise, or any person involved with the regional center or regional center associated commercial enterprise fails to provide an attestation or information requested by the Secretary or provides any false attestation or information under clause (iii); or

‘‘(IV) the regional center, a regional center associated commercial enterprise, or any person involved with the regional center or regional

Comment [AILA35]: AMEND:

“suspend or terminate”

Comment [AILA36]: COMMENT:

Fundamental notions of due process in our laws require the government to present evidence to support its findings, provide an opportunity to respond to such findings, and an opportunity for an appeal to an objective tribunal.

Please see attached a full brief on this matter attached here as **APPENDIX 2**.

Comment [AILA37]: ADD after “has””

“intentionally”

Comment: It is important given the breadth of the liability that inadvertent failures of indirectly involved third parties should not be grounds for terminating a regional center acting in good faith.

center associated commercial enterprise has engaged in fraud, misrepresentation, criminal misuse, or poses a threat to public safety or national security.

''(I) COMPLIANCE WITH SECURITIES LAWS.—

''(i) JURISDICTION.—In view of the objective of promoting investment in the United States, in an action filed by the Securities and Exchange Commission, the purchase or sale of securities offered or sold by any regional center or any party associated with a regional center shall be deemed to have occurred within the territory of the United States for purposes of the securities laws, and subject matter jurisdiction shall also lie within the United States.

''(ii) REGIONAL CENTER CERTIFICATIONS REQUIRED.—

''(I) INITIAL CERTIFICATION.—The Secretary of Homeland Security shall not approve an application for regional center designation or regional

center amendment unless the regional center certifies that the regional center is in compliance with and has policies and procedures reasonably designed to ensure that all parties associated with the regional center remain in compliance with the securities laws of the United States and of any State in which the regional center operates in connection with the offer, purchase, or sale of securities or the provision of investment advice by the regional center or parties associated with the regional center.

''(II) REISSUE.—A regional center shall annually reissue a certification described in subclause (I) in accordance with subparagraph (G). Annual certifications under this subclause shall also certify compliance with clause (iii) by stating that the certifier is in a position to have knowledge of the offers, purchases, and sales of securities or the provision of investment advice by parties associ-

ated with the regional center and, to the best of the certifier's knowledge, after reasonable investigation, all such offers, purchases, and sales of securities or the provision of investment advice complied with securities laws of the United States and that records, data, and information related to such offers, purchases, and sales have been maintained.

''(III) EFFECT OF NONCOMPLIANCE.—If a regional center, through its due diligence, discovered during the previous fiscal year that the regional center or any party associated with the regional center was not in compliance with the securities laws of the United States, the certifier shall—

''(aa) describe the activities that led to noncompliance;

''(bb) describe the actions taken to remedy the noncompliance; and

''(cc) certify that the regional center and all parties asso-

Comment [AILA38]: COMMENT:

The Committee is concerned that this provision would require a regional center to certify and admit to potential violations that (a) may not rise to the level of actually imposing any liability under U.S. securities laws, and (b) requires regional centers to supplant the duties of securities enforcement and monitoring bodies, the SEC and FINRA.

Moreover, this subclause also effectively requires the regional center to act as whistleblower with respect to potential third party noncompliance, as it covers "any party associated with the regional center." The failure by regional center to so whistleblow would subject the regional center to suspension or termination under clause (iv). Erroneous report of third party noncompliance would also expose the regional center to having made a false accusation.

The Committee supports oversight and regulation by the SEC and all other agencies having jurisdiction. Item (aa), however, appears needlessly overreaching and potentially perilous to good faith regional centers.

ciated with the regional center are currently in compliance.

''(iii) OVERSIGHT REQUIRED.—Each regional center shall monitor and supervise all offers, purchases, and sales of, and advice relating to, securities made by parties associated with the regional center to ensure compliance with the securities laws of the United States, and maintain records, data, and information relating to all such offers, purchases, sales, and advice during the 5-year period beginning on the date of their creation. Such records, data, and information shall be made available to the Securities and Exchange Commission and to the Secretary upon request.

''(iv) SUSPENSION OR TERMINATION.—The Secretary, in the Secretary's unreviewable discretion, shall suspend or terminate the designation of any regional center that does not provide the certification described in clause (ii). In addition to any other authority provided to the Secretary under this paragraph, the Secretary, in the Secretary's unreviewable

Comment [AILA39]: COMMENT:

Generally, same due process check should be in place as more fully briefed in **Appendix 2**.

But this subparagraph (I) has more process built in than subparagraphs (G) or (H). For example, there is no allowance for mere suspensions in subparagraph (H); violations are subject to termination. To the extent that greater due process protections are provided in subparagraph (I), those should be adopted into subparagraphs (G) and (H).

Comment [AILA40]: COMMENT:

"Violation" of the certification in clause (ii) triggers termination already under subparagraph (G). This clause may be redundant, although its grounds for suspension or termination is based on failure to "provide."

discretion, may suspend or terminate the designation of any regional center or impose other sanctions against the regional center if the regional center or any parties associated with the regional center—

''(I) are permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction in connection with the offer, purchase, or sale of a security or the provision of investment advice;

''(II) are subject to any final order of the Securities and Exchange Commission that—

''(aa) bars such person from association with an entity regulated by the Securities and Exchange Commission; or

''(bb) constitutes a final order based on violations in connection with the offer, purchase, or sale of, or advice relating to, a security; or

''(III) knowingly submitted or caused to be submitted a certification

described in clause (ii) that contained an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

''(v) SAVINGS PROVISION.—Nothing in this subparagraph may be construed to impair or limit the authority of the Securities and Exchange Commission under the Federal securities laws.

''(vi) DEFINED TERM.—In this subparagraph, the term 'parties associated with a regional center' means—

''(I) the regional center;

''(II) any commercial enterprise associated with the regional center;

''(III) the regional center's and associated commercial enterprise's owners, officers, directors, managers, partners, agents, employees, promoters and attorneys; and

''(IV) any person in active concert or participation with the regional

Comment [AILA41]: COMMENT:

Again, the scope of persons covered is unreasonably broad.

RECOMMENDATION: ADOPT THE STANDARD FOR COVERED PERSONS HOLDING "POSITIONS OF SUBSTANTIVE AUTHORITY" IN H.R. 616, SECTION 2(a)(4), page 8.

center or directly or indirectly controlling, controlled by, or under common control with the regional center.

''(J) EB–5 INTEGRITY FUND.—

''(i) ESTABLISHMENT.—There is established in the United States Treasury a special fund, which shall be known as the EB–5 Integrity Fund (referred to in this subparagraph as the 'Fund'). Amounts deposited into the Fund shall be available until expended to the Secretary of Homeland Security for the purposes set forth in clause (iii).

''(ii) FEES.—The Secretary of Homeland Security shall collect an annual fee of $20,000 for the Fund from each regional center designated under subparagraph (E). The first fee under this clause shall be due not later than January 1, 2016, and subsequent fees due not later than January 1 of each year thereafter. Newly designated regional centers shall pay their initial fee for the calendar year following the calendar year during which the regional center was so designated. The Secretary may pre-

Comment [AILA42]: COMMENT:

As drafted, nonprofit and government owned or operated regional centers will also have to pay this fee.

RECOMMENDATION: CONSIDER EXEMPTING NONPROFIT AND GOVERNMENT AFFILIATED REGIONAL CENTERS.

scribe regulations, as necessary, to increase the dollar amount specified under this clause to ensure the Secretary's continued ability to carry out the activities specified in clause (iii).

''(iii) PERMISSIBLE USES OF FUND.—The Secretary of Homeland Security shall—

''(I) use not less than ⅓ of the amounts deposited into the Fund to conduct audits and site visits (announced and unannounced);

''(II) use not less than ⅓ of the amounts deposited into the Fund for investigations based outside of the United States, including—

''(aa) monitoring and investigating program-related events and promotional activities; and

''(bb) ensuring an alien entrepreneur's compliance with subparagraph (L);

''(III) use amounts deposited into the Fund—

''(aa) to detect and investigate fraud or other crimes; and

''(bb) to determine whether regional centers, associated commercial enterprises, and alien entrepreneurs (and alien spouses and alien children, if any) comply with applicable immigration laws and regulations;

''(IV) use amounts deposited into the Fund to conduct interviews of the owners, officers, directors, managers, partners, agents, employees, promoters, and attorneys of a regional center and regional center associated commercial enterprise; and

''(V) otherwise use amounts deposited into the Fund as the Secretary determines to be necessary, including monitoring compliance with the requirements under section 7 of the American Job Creation and Investment Promotion Reform Act of 2015.

''(iv) FAILURE TO PAY FEE.—The Secretary of Homeland Security shall—

''(I) impose a reasonable penalty if a regional center does not pay the fee required under clause (ii) within 30 days of the date on which such fee is due under clause (ii); and

''(II) terminate the designation of any regional center that does not pay the fee required under clause (ii) before 90 days after the date on which such fee is due under clause (ii).

''(v) REPORT.—The Secretary shall submit an annual report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that describes how amounts in the Fund were expended during the previous fiscal year.

''(K) DIRECT AND THIRD-PARTY PROMOTERS.—

''(i) RULES AND STANDARDS.—Direct and third party promoters of a regional center, parties associated with a regional

Comment [AILA43]: STRIKE "parties associated with a regional center":

This term is defined in subparagraph (I) for that subparagraph only. That definition moreover does not work for subparagraph (K) (for example, subparagraph (I) definition includes regional centers). Alternatively to striking, re-define for subparagraph (K) purposes.

center, or of the investment opportunities of a regional center, shall comply with the rules and standards prescribed by the Secretary of Homeland Security to oversee regional center promotion, including—

''(I) registration with U.S. Citizenship and Immigration Services, which the Secretary shall make publicly available;

''(II) minimum qualifications;

''(III) guidelines for offering investment opportunities and representing the visa process to foreign entrepreneurs; and

''(IV) permissible fee arrangements.

''(ii) EFFECT OF VIOLATION.—If the Secretary determines, in the Secretary's unreviewable discretion, that a direct or third-party promoter has violated clause (i), the Secretary shall suspend or permanently bar such individual from participation in the program described in subparagraph (E).

Comment [AILA44]: COMMENT:

Fundamental notions of due process in our laws require the government to present evidence to support its findings, provide an opportunity to respond to such findings, and an opportunity for an appeal to an objective tribunal.

The bill, in particular subparagraph (I), seeks to bring overseas activities into U.S. jurisdiction. To be fair, such overseas entities then should be accorded due process under U.S. laws, as of course should U.S. entities such as regional centers.

Please see attached a full brief on this matter attached here as **APPENDIX 2**.

''(iii) COMPLIANCE.—Each regional center shall maintain a written agreement between the regional center or regional center associated commercial enterprise and each direct or third-party promoter operating on behalf of such regional center or commercial enterprise that outlines the rules and standards prescribed under clause (i).

''(L) SOURCE OF FUNDS.—

''(i) IN GENERAL.—An alien entrepreneur shall demonstrate that the capital required under subparagraph (A) and any funds used to pay administrative costs and fees associated with the alien's investment were obtained from a lawful source and through lawful means.

''(ii) REQUIRED INFORMATION.—The Secretary of Homeland Security shall require, as applicable, that an alien entrepreneur petition under this paragraph contain—

''(I) business and tax records, including—

Comment [AILA45]: COMMENT:

The Committee does not object to new rules governing lawful source of funds in concept. However, some provisions are so broad as to be vague. Also there are restrictions that do not appear to advance the purpose of excluding unlawful funds from EB-5 investment. These points are made in greater detail below.

Comment [AILA46]: STRIKE OR CLARIFY:

"and any funds used to pay administrative costs and fees associated with the alien's investment"

This phrase is very broad, in particular "fees associated with" investment, and it is further unclear how this rule may be enforced. An investor may have a number of fees associated with the EB-5 investment paid to a number of different parties, including translators, medical examiners, accountants and so on. To the extent that this information is collected annually from regional centers under subparagraph (G)(i)(VI)(ff), USCIS may in theory compare the annual certification against individual Form I-526 petitions, but that would seem impractical.

Please see also comments to subparagraph (G)(i)(VI)(ff) and to subparagraph (G), generally.

''(aa) foreign business registration records;

''(bb) corporate or partnership tax returns (or any other entity in any form that has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within 7 years, with any taxing jurisdiction in or outside the United States by or on behalf of the alien entrepreneur; and

''(cc) evidence identifying any other source of capital or administrative fees;

''(II) evidence related to monetary judgments against the alien entrepreneur, including certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative

proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the alien entrepreneur from any court in or outside the United States; and

''(III) the identity of all persons who transfer into the United States, on behalf of the entrepreneur—

''(aa) any funds that are used to meet the capital requirement under subparagraph (A); and

''(bb) any funds that are used to pay administrative costs and fees associated with the alien's investment.

''(iii) GIFT RESTRICTIONS.—Gifted funds may be counted toward the minimum capital investment requirement under subparagraph (C) only if such funds were gifted to the alien entrepreneur by the alien entrepreneur's spouse, parent, child, sibling, or grandparent and such funds were gifted in good faith and not to circumvent any limitations imposed on per-

Comment [AILA47]: COMMENT:

There are a number of issues with clause (iii):

(1) Gifts from bona fide family members (for example, uncles, in-laws, domestic partners, common law spouses) and friends would be excluded. The line appears arbitrary.
(2) Moreover, the qualifying relatives are listed in the alternative with the conjunction "or." Joint gifts from grandparents, for example, may not qualify under this language.
(3) The language might limit gifts to "funds" when other types of assets are acceptable "capital" as defined.
(4) The "good faith" requirement is vague; it is unclear what evidence would establish good faith.
(5) Similarly, the term "significant portion" is also vague. In this connection, please note that donor's funds are typically sourced and traced in a manner similar to the petitioner, himself. So while there is not much of a new burden, vague terms should be avoided in the statute.

RECOMMENDATION: STRIKE CLAUSE (iii).

missible sources of capital under this subparagraph. If a significant portion of the capital invested under subparagraph (A) was gifted to the alien entrepreneur, the Secretary shall require the alien entrepreneur's petition under this paragraph to include records described in subclauses (I) and (II) of clause (ii) from the donor.

''(iv) LOAN RESTRICTIONS.—Capital derived from indebtedness may be counted toward the minimum capital investment requirement under subparagraph (C) only if such capital is—

''(I) secured by assets owned by the alien entrepreneur; and

''(II) issued by a reputable banking or lending institution that is properly chartered or licensed under the laws of any State, territory, country, or applicable jurisdiction, which the Secretary shall determine after consulting with relevant commercial or government databases, such as those of the Department of Treasury's Office of Foreign Assets Control, Office

Comment [AILA48]: COMMENT:

There are a number of issues with clause (iv):

(1) The term "derived from indebtedness" is overly broad. Under clause (iii) above and under current law, gifts to the petitioner are permitted. Gift by a parent derived from a mortgage loan may not qualify under this language because it is "derived from indebtedness" yet not secured by the petitioner's assets.
(2) The term "properly chartered or licensed" provision is vague. The Committee found no affirmative list of banks publicly available on OFAC of FINCEN websites. For this concept to work, petitioners should have advance notice of which banks qualify. It should be noted also that bona fide loans from smaller, "microlenders" would be excluded.

of Terrorist Financing and Financial Crimes, and Financial Crimes Enforcement Network.

''(M) TREATMENT OF ENTREPRENEURS IF REGIONAL CENTER TERMINATED.—

''(i) IN GENERAL.—Upon the termination of a regional center or regional center associated commercial enterprise under this paragraph—

''(I) the conditional permanent residence of an alien who has been admitted to the United States pursuant to section 216A(a)(1) based on an investment in a commercial enterprise associated with the terminated regional center or regional center associated commercial enterprise shall continue to be authorized; and

Comment [AILA49]: AMEND "authorized" to "a conditional permanent resident".

''(II) the alien shall not accrue any period of unlawful presence under section 212(a)(9) during the 180-day period following such termination unless the Secretary has reason to believe the alien was a knowing participant in the conduct that led to the

termination of such regional center or regional center associated commercial enterprise.

''(ii) NEW REGIONAL CENTER OR INVESTMENT.—The conditional permanent resident status of an alien described in clause (i)(I) shall be terminated at the end of the 180-day period described in clause (i)(II) unless—

''(I) in the case of the termination of a regional center—

''(aa) the associated commercial enterprise affiliates with an approved regional center designated to operate within the same geographic area as the commercial enterprise; or

''(bb) such alien invests in another commercial enterprise associated with an approved regional center; or

''(II) in the case of the termination of a regional center associated commercial enterprise, such alien invests in another commercial enterprise

Comment [AILA50]: ADD at the end of "enterprise":

", or if none exists, allow such associated commercial enterprise to be included with a proposal to establish a regional center under subparagraph (E)(iii)."

associated with an approved regional center.

''(iii) REMOVAL OF CONDITIONS.—Aliens described in subclause (I)(bb) and (II) of clause (ii) shall be eligible to have their conditions removed pursuant to section 216A beginning on the date that is 2 years after the date of the subsequent investment.

''(N) FRAUD, CRIMINAL MISUSE, AND THREATS TO NATIONAL INTERESTS.—

''(i) DENIAL OR REVOCATION.—If the Secretary of Homeland Security determines, in the Secretary's unreviewable discretion, that the approval of a petition, application, or benefit described in this paragraph is contrary to the national interest of the United States for reasons relating to fraud, misrepresentation, criminal misuse, or threats to public safety or national security, the Secretary shall deny or revoke the approval of—

''(I) a petition seeking classification of an alien as an alien entrepreneur under this paragraph;

Comment [AILA51]: COMMENT:

Fundamental notions of due process in our laws require the government to present evidence to support its findings, provide an opportunity to respond to such findings, and an opportunity for an appeal to an objective tribunal.

Please see attached a full brief on this matter attached here as **APPENDIX 2**.

Revocations in particular must be preceded by due process. Once a Form I-924 is approved, a chain of I-526 and I-829petitions would be affected by the revocation. For that reason, substantial evidence at minimum should be in the record to support the Secretary's decision to revoke.

''(II) a petition to remove conditions under section 216A before granting lawful permanent resident status or any other petition, application, or benefit based upon the previous or concurrent filing or approval of a petition for classification of an alien under this paragraph;

''(III) an application for approval of a business plan in a regional center associate commercial enterprise; or

''(IV) an application for designation as a regional center.

''(ii) DEBARMENT.—If a regional center or regional center associated commercial enterprise has its designation or participation in the program under this paragraph terminated for reasons relating to fraud, intentional material misrepresentation, criminal misuse, or threats to public safety or national security, any person associated with such regional center or regional center associated commercial enterprise, including an alien investor, shall be permanently barred from future participa-

tion in the program if the Secretary of Homeland Security, in the Secretary's unreviewable discretion, determines that such person was a knowing participant in the conduct that led to the termination.''.

(c) EFFECTIVE DATE.—The amendments made by this section—

(1) shall take effect on the date of the enactment of this Act; and

(2) shall apply to—

(A) any application to designate a regional center, and any person involved with the regional center, that is pending or approved on or after the date of the enactment of this Act; and

(B) any regional center approved before the date of the enactment of this Act, on or after a delayed effective date that is 1 year after such date of enactment with respect to any person involved in the regional center on or after such delayed effective date, unless otherwise provided in this section.

(d) GAO REPORT.—Not later than December 31, 2018, the Comptroller General of the United States shall submit a report to the Committee on the Judiciary of the

Comment [AILA52]: *IMPORTANT* COMMENT:

The scope of Section 2(c) , which would make Section 2 effective upon enactment, lacks clarity. Given the sweeping changes contemplated in Section 2, clarity and a reasonable effective date are essential.

As of 2Q 2015, 13,526 Form I-526 petitions and 334 Form I-924 applications were pending. If the drafters intended to make Section 2 effective upon enactment, USCIS would be compelled to apply the new rules to those pending cases. Current processing times for I-526s and I-924s are 13.4 months and 12.2 months, respectively. Aside from the fundamental unfairness of applying new rules to cases pending over a year, the Committee believes that the vast majority of pending cases would not qualify under Section 2 rules. Accordingly, if Section 2 is effective upon enactment, the vast majority of pending cases will likely be denied. The results are obvious and need no enumeration, but would include project failure or at least risk of failure, investors with aged-out children, wasted agency resources on cases that have begun processing, wasted private resources on preparing eligible filings, and diminishment of program credibility.

RECOMMENDATION: ENSURE GRANDFATHERING OF ALL PETITIONS (I-526, I-829) AND APPLICATIONS (I-924) AND ALL PETITIONS AND APPLICATIONS ASSOCIATED WITH SUCH PETITIONS OR APPLICATIONS PENDING ON THE EFFECTIVE DATE. FOR EXAMPLE, IF A FORM I-924 IS PENDING ON THE EFFECTIVE DATE, THE ASSOCIATED FORM I-526S SHOULD BE GRANDFATHERED AS THE INVESTORS WILL HAVE BEEN PROCURED AND PETITIONS PREPARED BASED ON THE ELIGIBILTIY OF THE PENDING I-924.

RELATEDLY, GIVEN THE EXTENSIVE SCOPE OF CHANGES, THE EFFECTIVE DATE SHOULD BE A TIME LATER THAN THE ENACTMENT DATE. H.R. 616, FOR EXAMPLE, CONTEMPLATES AN EFFECTIVE DATE OF 6 MONTHS AFTER ENACTMENT, AND REQUIRES THE SECRETARY OF HOMELAND SECURITY TO PROMULGATE IMPLEMENTING RULES 180 DAYS AFTER THE EFFECTIVE DATE. SIMILAR PROVISIONS SHOULD BE ADOPTED HERE.

Senate and the Committee on the Judiciary of the House of Representatives that describes—

(1) the economic benefits of the regional center program established under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), including the steps taken by U.S. Citizenship and Immigration Services to verify job creation;

(2) the extent to which U.S. Citizenship and Immigration Services ensures compliance by regional center participants;

(3) the extent to which U.S. Citizenship and Immigration Services has maintained records by regional centers and associated commercial enterprises, including annual statements and certifications;

(4) the steps taken by U.S. Citizenship and Immigration Services to verify the source of funds, as required under section 203(b)(5)(L) of the Immigration and Nationality Act, as added by subsection (b);

(5) the extent to which U.S. Citizenship and Immigration Services collaborates with other Federal and law enforcement agencies, particularly to detect illegal activity and threats to national security;

(6) the extent to which U.S. Citizenship and Immigration Services has prevented fraud and abuse in regional center activities, including the designation of a regional center investment in a targeted employment area;

(7) the extent to which U.S. Citizenship and Immigration Services has used its authority to sanction, suspend, bar, or terminate a regional center or individuals affiliated with a regional center;

(8) the steps that have been taken to oversee direct and third-party promoters under section 203(b)(5)(H) of the Immigration and Nationality Act, as added by subsection (b);

(9) the extent to which employees of the Department of Homeland Security have complied with the ethical standards and transparency requirements under section 7; and

(10) an accounting of the expenditure of amounts from the EB–5 Integrity Fund established under section 203(b)(5)(J) of the Immigration and Nationality Act, as added by subsection (b).

(e) INSPECTOR GENERAL REPORT.—Not later than December 31, 2018, the Inspector General of the Intelligence Community, in coordination with the Inspector General of the Department of Homeland Security and

after consultation with relevant Federal agencies, including U.S. Immigration and Customs Enforcement, shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that describes—

(1) vulnerabilities within the EB–5 Immigrant Investor Program that may undermine the national security of the United States;

(2) actual or potential use of the EB–5 Immigrant Investor Program to facilitate export of sensitive technology;

(3) actual or potential use of the EB–5 Immigrant Investor Program to facilitate economic espionage;

(4) actual or potential use of the EB–5 Immigrant Investor Program by foreign government agents; and

(5) actual or potential use of the EB–5 Immigrant Investor Program to facilitate terrorist activity, including funding terrorist activity or laundering terrorist funds.

SEC. 3. CONDITIONAL PERMANENT RESIDENT STATUS FOR ALIEN ENTREPRENEURS, SPOUSES, AND CHILDREN.

(a) IN GENERAL.—Section 216A of the Immigration and Nationality Act (8 U.S.C. 1186b) is amended—

(1) by striking ''Attorney General'' each place such term appears (except in subsection (d)(2)(C)) and inserting ''Secretary of Homeland Security'';

(2) in subsection (a), by amending paragraph (1) to read as follows:

''(1) CONDITIONAL BASIS FOR STATUS.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), an alien entrepreneur, alien spouse, and alien child shall be considered, at the time of obtaining status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

''(B) EXCEPTION.—Alien entrepreneurs who meet the requirements under subsection (d)(2)(A)(ii) shall obtain the status of an alien lawfully admitted for permanent residence without a conditional basis upon approval of the petition required under such subsection.'';

(3) in subsection (c)—

(A) in the heading, by striking ''OF TIMELY PETITION AND INTERVIEW'';

(B) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by striking ''In order'' and inserting ''Except as provided in paragraph (3)(D), in order'';

(ii) in subparagraph (A), by striking '', and'' and inserting a semicolon;

(iii) in subparagraph (B), by striking ''Service respecting the facts and information described in subsection (d)(1).'' and inserting ''Department of Homeland Security respecting the facts and information described in subsection (d)(1); and''; and

(iv) by adding at the end the following:

''(C) the Secretary shall perform a site visit to the job creating entity in which the alien entrepreneur invested capital under section 203(b)(5)(A), which visit may take place at any time after an application for approval of investment in a commercial enterprise is filed under section 203(b)(5)(F).''; and

Comment [AILA53]: COMMENT:

Please see our comments to Section 2 with reference to new proposed subparagraph (F)((iv).

Recommendation: add at the end of section 216A(c)(1)(C): "and before a petition is approved under section 216(A) but within the two-year period of conditional residency."

(C) in paragraph (3)(A), by striking ''the'' before ''such filing'';

(4) in subsection (d)—

(A) in paragraph (1)(A)(ii), by inserting ''except for alien entrepreneurs described in subsection (d)(2)(A)(ii),'' before ''sustained'';

(B) in paragraph (2), by amending subparagraph (A) to read as follows:

''(A) 90-DAY PERIOD BEFORE SECOND ANNIVERSARY.—(i) Except as provided in clause (ii) and subparagraph (B), the petition under subsection (c)(1)(A) shall be filed during the 90-day period before the second anniversary of the alien entrepreneur's lawful admission for permanent residence.

''(ii) If the alien entrepreneur has sustained the actions described in paragraph (1)(A)(i) for at least a 24-month period before admission, the alien entrepreneur may file the petition under subsection (c)(1)(A) any time after such period and before admission for permanent residence.''; and

(C) in paragraph (3), by striking ''Service'' and inserting ''Department of Homeland Security'';

Comment [AILA54]: ADD after "admission":

"for permanent residence"

Comment: The provision is a welcome reprieve to lengthy waits occasioned by visa backlogs. However, it is unclear whether the I-829 would be pending until admission and end of the conditional residency period, or whether it will be approved, approval itself conditioned upon ultimate conditional permanent residency admission and 2 year period.

(5) by redesignating subsection (f) as subsection (g); and

(6) by inserting after subsection (e) the following:

''(f) FRAUD, MISREPRESENTATION, CRIMINAL MISUSE, OR THREATS TO THE PUBLIC SAFETY OR NATIONAL SECURITY.—If the Secretary of Homeland Security determines, in the Secretary's sole and unreviewable discretion, that the approval of any petition under this section or the conditional permanent resident status granted to an alien entrepreneur under subsection (a) is contrary to the national interest of the United States for reasons relating to fraud, misrepresentation, criminal misuse, or threats to public safety or national security, the Secretary shall—

''(1) notify the alien involved of such determination without being required to disclose the basis for such determination to the extent such disclosure would be contrary to the national interest of the United States; and

''(2) deny such petition or terminate the permanent resident status of the alien involved (and the alien spouse and alien children of such immigrant) as of the date of such determination.''.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided under paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) EXCEPTION.—The amendment made by subsection (a)(3)(B)(iv) shall take effect on the date that is 2 years after the date of the enactment of this Act.

SEC. 4. EB–5 VISA REFORMS.

(a) TARGETED EMPLOYMENT AREAS.—

(1) IN GENERAL.—Section 203(b)(5)(B) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)(B)) is amended to read as follows:

''(B) SET-ASIDE FOR TARGETED EMPLOYMENT AREAS.—

''(i) IN GENERAL.—Not fewer than 5,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A), which—

''(I) is investing such capital in a targeted employment area; and

''(II) will create employment in such targeted employment area.

''(ii) DURATION OF HIGH UNEMPLOYMENT AREA DESIGNATION.—A designation of a high unemployment area as a targeted employment area shall be valid for the 2-year period beginning on the date of approval of an application filed under subparagraph (F) or at the time of the investment for aliens not subject to the requirements of subparagraph (F). Such designation may be renewed for additional 2-year periods if the area continues to meet the definition of a high unemployment area. An entrepreneur who has made the required amount of investment in such a targeted employment area during its period of designation shall not be required to increase the amount of investment based upon expiration of the designation.''.

(b) ADJUSTMENT OF MINIMUM EB–5 INVESTMENT AMOUNT.—Section 203(b)(5)(C) of such Act (8 U.S.C. 1153(b)(5)(C)) is amended—

(1) by striking clauses (i) and (ii) and inserting the following:

''(i) MINIMUM INVESTMENT AMOUNTS.—Except as otherwise provided

Comment [AILA55]: COMMENT:

We welcome this extension of TEA validity period. If adopted, it will add certainty and predictability in an important aspect of investment.

in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,200,000. In the case of an investment in a targeted employment area, the amount of capital required under subparagraph (A) shall be $800,000.

''(ii) ADJUSTMENT OF MINIMUM INVESTMENT AMOUNTS.—

''(I) IN GENERAL.—The Secretary of Homeland Security, in consultation with the Secretary of Labor and the Secretary of Commerce, may from time to time prescribe regulations increasing the dollar amounts specified under clause (i).

''(II) AUTOMATIC ADJUSTMENTS.—Beginning on January 1, 2020, and on every fifth subsequent January 1—

''(aa) if the Secretary did not increase the minimum amount during the previous 5 fiscal years, the amounts specified in clause (i) shall automatically be adjusted by the amount of the

Comment [AILA56]: COMMENT:

It is unclear when the adjustments would become effective when they are made. For example, if automatically adjusted on January 1 under item (aa), would the Secretary give notice of the adjusted amount and provide fair amount of time before the adjusted amount became the required amount?

The Committee urges that fair notice be provided in advance of adjustments.

cumulative percentage change in the Consumer Price Index (CPI–U) for the previous 5 fiscal years;

''(bb) if the Secretary increased the minimum amount during the previous 5 fiscal years by an amount that is less than the cumulative percentage change in the CPI–U during the previous 5 fiscal years, the amounts specified in clause (i) shall automatically be adjusted by the amount of such cumulative percentage change for such period minus any increase prescribed by the Secretary by regulations; or

''(cc) if the Secretary increased the minimum amount during the previous 5 fiscal years by an amount that is greater than the cumulative percentage change in the CPI–U during the previous 5 fiscal years, the amounts specified in clause (i) shall not be increased.

''(iii) MINIMUM INVESTMENT AMOUNT IN A TARGETED EMPLOYMENT AREA.—The minimum investment amount in a targeted employment area shall be not less than ½ and not more than ¾ of the investment in a non-targeted area of employment.''; and

(2) in clause (iii) by striking ''the Attorney General'' and inserting ''the Secretary''.

(c) DEFINITIONS.—

(1) IN GENERAL.—Section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), as amended by subsections (a) and (b) and by section 2, is further amended by amending subparagraph (D) to read as follows:

''(D) DEFINITIONS.—In this paragraph:

''(i) CAPITAL.—The term 'capital'—

''(I) means all real, personal, or mixed tangible assets owned and controlled by the alien entrepreneur, or held in trust for the benefit of the alien and to which the alien has unrestricted access;

''(II) shall be valued at fair market value in United States dollars, in accordance with Generally Accepted

Comment [AILA57]: COMMENT:

It is unclear what is meant by "mixed tangible assets." As wired cash, the most commonly used form of capital, is arguably intangible, the Committee recommends striking this phrase.

Accounting Principles or other standard accounting practice adopted by the Securities and Exchange Commission, at the time it is invested under this paragraph; and

''(III) shall not include assets acquired, directly or indirectly, by unlawful means, including any cash proceeds of indebtedness secured by such assets.

''(ii) COMMERCIAL ENTERPRISE ASSOCIATED WITH A REGIONAL CENTER.—The terms 'commercial enterprise associated with a regional center' and 'regional center associated commercial enterprise' mean any for-profit activity formed for the ongoing conduct of lawful business, including a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity, that associates with a regional center and receives, or is established to receive, capital investment under the regional center program described in subparagraph (E).

Comment [AILA58]: COMMENT:

We are unsure whether any such "standard accounting practice adopted by the Securities and Exchange Commission" exists. We understand the SEC currently only recognizes GAAP.

''(iii) FULL-TIME EMPLOYMENT.—The term 'full-time employment' means employment in a position that requires at least 35 hours of service per week for at least a 24-month period.

''(iv) HIGH UNEMPLOYMENT AREA.—The term 'high unemployment area' means an area, using the most recent census data available, consisting of a census tract that has an unemployment rate that is at least 150 percent of the national average unemployment rate.

''(v) RURAL AREA.—The term 'rural area' means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

''(vi) TARGETED EMPLOYMENT AREA.—

''(I) IN GENERAL.—The term 'targeted employment area' means a high unemployment area, a rural area, or any area within the geographic

Comment [AILA59]: ADD AFTER "period":

", except that this clause shall not apply to jobs that are estimated to be created indirectly through investment under subparagraph (E)."

USCIS recognizes that input-put models jobs used to estimate indirect job creation do not specify whether the out of jobs is full-time. (December 2009 USCIS EB-5 Memorandum.) Moreover, USCIS recently recognized that such modeled jobs are similarly not specified as permanent. Accordingly, the published summary of the June 2015 Stakeholder's Call states: "USCIS will not request evidence to validate to a greater level of certainty that the indirect jobs are full-time or permanent." (USCIS Talking Points from June 4, 2015 *Interactive Series* stakeholders call.)

Accordingly, clause (iii) should be limited to aliens seeking admission under subparagraph (A) but not (E).

Comment [AILA60]: COMMENT:

The Committee deliberately declines debate on the best definition of "high unemployment area" from a policy standpoint.

The Committee observes, however, that limiting the definition to a single census tract would not address the high unemployment at that census tract. The Bureau of Labor Statistics measure unemployment by place of residence, not by place of employment. Accordingly, locating a project in census tract with 150% of the national average unemployment rate will not directly impact the high unemployment in that census tract, as labor at such a project would only incidentally reside at that census tract. Rather, labor at any worksite draws typically from a multicounty commuter shed, as confirmed by U.S. census data as well as the RIMS II manual. Accordingly, the proper geography for measuring whether high unemployment is addressed by any particular project would examine the surrounding commuter shed to determine whether there are "pockets of high unemployment" within the project area.

The Committee further notes that in the original Congress enacting IMMACT which created the fifth preference employment category, legislators contemplated high unemployment targeted areas as areas with such "pockets of high unemployment," and not a single area itself having high unemployment. (See Immigration Act of 1990, Conference Report, 136 Cong. Rec. S17103.)

boundaries of any military installation closed, during the 20 year period immediately preceding the filing of an application under subparagraph (F), based upon a recommendation by the Defense Base Closure and Realignment Commission.

''(II) ELIGIBILITY.—Eligibility for designation as a targeted employment area shall be determined by the Secretary of Homeland Security, who shall not be bound by the determination of any other Federal or State governmental or nongovernmental entity.''.

(2) RULEMAKING.—The Secretary of Homeland Security, in consultation with the Secretary of Defense, shall issue appropriate regulations to account for the modified definition of targeted employment area in section 203(b)(5)(D)(vi) of the Immigration and Nationality Act, as added by paragraph (1).

(d) AGE DETERMINATION FOR CHILDREN OF ALIEN ENTREPRENEURS.—Section 203(h) of the Immigration and Nationality Act (8 U.S.C. 1153(h)) is amended by adding at the end the following:

''(5) AGE DETERMINATION FOR CHILDREN OF ALIEN ENTREPRENEURS.—An alien admitted under subsection (d) as a lawful permanent resident on a conditional basis as the child of an alien lawfully admitted for permanent residence under subsection (b)(5), whose lawful permanent resident status on a conditional basis is terminated under section 216A, shall continue to be considered a child of the principal alien for the purpose of a subsequent immigrant petition by such alien under subsection (b)(5) if the alien remains unmarried and the subsequent petition is filed by the principal alien not later than 1 year after the termination of conditional lawful permanent resident status. No alien shall be considered a child under this paragraph with respect to more than 1 petition filed after the alien reaches 21 years of age.''.

(e) ENHANCED PAY SCALE FOR CERTAIN FEDERAL EMPLOYEES ADMINISTERING THE EB–5 PROGRAM.—The Secretary of Homeland Security may establish, fix the compensation of, and appoint individuals to, designated critical, technical, and professional positions needed to administer sections 203(b)(5) and 216A of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5) and 1186b).

Comment [AILA61]: COMMENT:

The Committee applauds the drafters for the number of ameliorative provisions in Section 4, including the one-time protection of aged-out children, concurrent filing of applications for adjustment, and inclusion of EB-5 in INA section 245(k). On behalf of our investor clients, we thank you.

Comment [AILA62]: ADD:

"or subparagraph (M) of section 203(b)(5)"

(f) CONCURRENT FILING OF EB–5 PETITIONS AND APPLICATIONS FOR ADJUSTMENT OF STATUS.—Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is amended—

(1) in subsection (k), in the matter preceding paragraph (1), by striking ''or (3)'' and inserting ''(3), or (5)''; and

(2) by adding at the end the following:

''(n) If the approval of a petition for classification under section 203(b)(5) would make a visa immediately available to the alien beneficiary, the alien beneficiary's application for adjustment of status under this section shall be considered to be properly filed whether the application is submitted concurrently with, or subsequent to, the visa petition.''.

(g) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided under paragraph (2), the amendments made by this section shall be effective upon the date of the enactment of this Act.

(2) EXCEPTIONS.—The amendments made by subsections (b)(1) and (c)(1) shall not apply to—

(A) applications for business plan approval for regional center investments in actual projects that were filed with, or approved by,

Comment [AILA63]: COMMENT:

The "grandfathering" of preapproval applications in Section (g)(2) should apply to all pending preapproval applications, Form I-526 petitions and Form I-829 petitions in their entirety, not limited to the prior investment amount and TEA designations. Please see our earlier Comment 52.

Section (g)(2) would only grandfather Form I-526 petitions affiliated with pending preapproval applications. Under the current law, preapproval applications are not mandatory. Many projects' merits are adjudicated on the Form I-526 without any Form I-924. Accordingly, such I-526s should be treated equally with preapproval applications, and all associated subsequent filings should likewise be grandfathered even if filed after the effective date.

the Secretary of Homeland Security before the date of the enactment of this Act; and

(B) petitions seeking classification under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)) and petitions filed under section 216A of such Act (8 U.S.C. 1186b) by immigrants investing in the same commercial enterprise concerning the same economic activity as contained in an application for business plan approval described in subparagraph (A).

SEC. 5. PROCEDURE FOR GRANTING IMMIGRANT STATUS.

(a) FILING ORDER.—Section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) is amended to read as follows:

''(H) An alien desiring to be classified under section 203(b)(5) may file a petition with the Secretary of Homeland Security. An alien petitioning for classification pursuant to section 203(b)(5)(E) may file a petition with the Secretary only after approval of investment in a commercial enterprise under section 203(b)(5)(F).''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a)—

(1) shall take effect on the date of the enactment of this Act; and

Comment [AILA64]: COMMENT:

Per our earlier comment, for this effective date to work in practice, premium processing of preapprovals under subparagraph (F) is essential.

(2) shall apply to any petition for classification pursuant to section 203(b)(5)(E) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)(E)) that is filed with the Secretary of Homeland Security on or after the date of the enactment of this Act.

SEC. 6. ADJUSTMENT OF FEES TO ACHIEVE EFFICIENT PROCESSING.

(a) FEE STUDY.—Not later than 30 days after the date of the enactment of this Act, the Director of U.S. Citizenship and Immigration Service shall initiate a study of fees charged in the administration of the program described in section 203(b)(5)(E) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)(E)).

(b) FEE LEVELS.—Notwithstanding section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)), and except as provided under subsection (c), the Director shall set fees for services provided pursuant to section 203(b)(5) of such Act at a level sufficient to ensure the full recovery only of the costs of providing such services, including the cost of ensuring that adjudication is completed, on average, not later than—

(1) 120 days after receiving a proposal for the establishment of a regional center described in section 203(b)(5)(E);

(2) 120 days after receiving an application for approval of investment in a commercial enterprise described in section 203(b)(5)(F);

(3) 150 days after receiving a petition from an alien desiring to be classified under section 203(b)(5)(E); and

(4) 180 days after receiving a petition from an alien for removal of conditions described in section 216A(c).

(c) ADDITIONAL FEES.—Additional fees in excess of the fee levels described in subsection (b) may be charged only to contribute—

(1) in an amount that is equal to the amount paid by all other classes of fee-paying applicants for immigration related benefits, to the coverage or reduction of the costs of processing or adjudicating classes of immigration benefit applications that Congress or, in the case of asylum applications, the Secretary has authorized to be processed or adjudicated at no cost or at a reduced cost to the applicant; and

(2) in an amount that is not greater than 1 percent of the fee for filing a petition under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), to improvements to the information technological systems used by the Secretary to

process, adjudicate, and archive applications and petitions under such section, including the conversion to electronic format of documents filed by petitioners and applicants for benefits under such section.

(d) RULE OF CONSTRUCTION.—Nothing in this section may be construed to require any modification of fees before the completion of—

(1) the fee study described in subsection (a); and

(2) regulations promulgated by the Secretary of Homeland Security, in accordance with subchapter II of chapter 5 and chapter 7 of title 5, United States Code (commonly known as the ''Administrative Procedures Act''), to carry out subsection (b).

SEC. 7. TRANSPARENCY.

(a) IN GENERAL.—Employees of the Department of Homeland Security, including the Secretary of Homeland Security, the Secretary's counselors, the Assistant Secretary for the Private Sector, the Director of U.S. Citizenship and Immigration Services, counselors to such Director, and the Chief of Immigrant Investor Programs at U.S. Citizenship and Immigration Services, shall act impartially and may not give preferential treatment to any organization or individual in connection with any aspect of the immigrant visa program described in section

203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b).

(b) IMPROPER ACTIVITIES.—Activities that constitute preferential treatment under subsection (a) shall include—

(1) working on, or in any way attempting to expedite or otherwise influence, in a manner not available to or accorded to all other petitioners, applicants, and seekers of benefits under the immigrant visa program described in section 203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b), the processing of, an application, petition, or benefit for—

(A) a regional center;

(B) a commercial enterprise associated with a regional center;

(C) a job-creating entity associated with a regional center; or

(D) any person or entity associated with such regional center, commercial enterprise, or job-creating entity; and

(2) meeting or communicating with persons associated with the entities described in paragraph (1), at the request of such persons, in a manner not available to or accorded to all other petitioners, ap-

plicants, and seekers of benefits under the immigrant visa program described in section 203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b).

(c) REPORTING OF COMMUNICATIONS.—

(1) WRITTEN COMMUNICATION.—Employees of the Department of Homeland Security, including the officials listed in subsection (a), shall include, in the record of proceeding for a case under section 203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b), actual or electronic copies of all case-specific written communication, including e-mails from government and private accounts, with non-Department persons or entities advocating for regional center proposals or individual petitions pending on or after the date of enactment of this Act.

(2) ORAL COMMUNICATION.—If substantive oral communication, including telephonic communication, virtual communication, and in-person meetings, takes place between officials of the Department of Homeland Security and non-Department persons or entities regarding specific cases under section 203(b)(5)(E) of the Immigration and Nationality Act (other than routine communications with other

Comment [AILA65]: COMMENT:

We are concerned that prejudicial or putatively prejudicial communication by other agencies may result in adverse Secretary actions (including the many instances of unreviewable terminations, revocations, and denials contemplated in the bill), and yet not be made a part of the record which man applicant may rebut.

Please see our fuller discussion of the need for due process at **Appendix 2**.

agencies of the Federal Government regarding the case, including communications involving background checks and litigation defense)—

(A) the conversation shall be recorded; or

(B) detailed minutes of the session shall be taken and included in the record of proceeding.

(3) NOTIFICATION.—

(A) IN GENERAL.—If the Secretary, in the course of written or oral communication described in this subsection, receives evidence about a specific case from anyone other than an affected party or his or her representative (excluding Federal Government or law enforcement sources), such information may not be made part of the record of proceeding and may not be considered in adjudicative proceedings unless—

(i) the affected party has been given notice of such evidence; and

(ii) if such evidence is derogatory, the affected party has been given an opportunity to respond to the evidence.

(B) INFORMATION FROM LAW ENFORCEMENT, INTELLIGENCE AGENCIES, OR CONFIDENTIAL SOURCES.—

Comment [AILA66]: COMMENT:

We are gratified to see process afforded to rebut prejudicial evidence. Substantial evidence, notice, opportunity to rebut, and appeal should accompany any adverse government action to deny, or more importantly, to revoke a benefit.

Please see our fuller discussion of the need for due process at **Appendix 2**.

(i) LAW ENFORCEMENT OR INTELLIGENCE AGENCIES.—Evidence received from law enforcement or intelligence agencies may not be made part of the record of proceeding without the consent of the relevant agency or law enforcement entity.

(ii) WHISTLEBLOWERS OR OTHER CONFIDENTIAL SOURCES.—Evidence received from whistleblowers or other confidential sources that is included in the record of proceeding and considered in adjudicative proceedings shall be handled in a manner that does not reveal the identity of the whistleblower or confidential source.

(d) CONSIDERATION OF EVIDENCE.—

(1) IN GENERAL.—No case-specific communication with persons or entities that are not part of the Department of Homeland Security may be considered in the adjudication of an application or petition under section 203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b), unless the communication is included in the record of proceeding of the case.

(2) WAIVER.—The Secretary of Homeland Security may waive the requirement under paragraph

(1) only in the interests of national security or for investigative or law enforcement purposes.

(e) CHANNELS OF COMMUNICATION.—

(1) E-MAIL ADDRESS OR EQUIVALENT.—The Director of U.S. Citizenship and Immigration Services shall maintain an e-mail account (or equivalent means of communication) for persons or entities—

(A) with inquiries regarding specific cases under section 203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b); or

(B) seeking non-case-specific information about the regional center program described in such section.

(2) COMMUNICATION ONLY THROUGH APPROPRIATE CHANNELS OR OFFICES.—

(A) ANNOUNCEMENT OF APPROPRIATE CHANNELS OF COMMUNICATION.—Not later than 40 days after the date of the enactment of this Act, the Director of U.S. Citizenship and Immigration Services shall announce that the only channels or offices by which petitioners, applicants, and seekers of benefits under the immigrant visa program described in section 203(b)(5)(E) of the Immigration and Nation-

ality Act, or such persons' representatives, may communicate with the Department of Homeland Security regarding specific cases under such section, or non-case-specific information about the regional center program applicable to certain cases under such section, are through—

(i) the e-mail address or equivalent channel described in paragraph (1);

(ii) the U.S. Citizenship and Immigration Services National Customer Service Center, or any successor to that Center; or

(iii) the U.S. Citizenship and Immigration Services Office of Public Engagement, Immigrant Investor Program Office, Stakeholder Engagement Branch, or any successors to those Offices or Branch.

(B) DIRECTION OF INCOMING COMMUNICATIONS.—

(i) IN GENERAL.—Employees of the Department of Homeland Security shall direct all persons making inquiries regarding the regional center program applicable to certain cases under section 203(b)(5)(E) of the Immigration and Nationality Act, as added by section 2(b) to the channels of

communication or offices listed in subparagraph (A).

(ii) SAVINGS PROVISION.—Nothing in this subparagraph may be construed to prevent Department employees from directing inquiries to the U.S. Citizenship and Immigration Services Ombudsman.

(C) LOG.—

(i) IN GENERAL.—The Director of U.S. Citizenship and Immigration Services shall maintain a written or electronic log of—

(I) all communications described in subparagraph (A), which shall reference the date, time, and subject of the communication, and the identity of the Department official, if any, to whom the inquiry was forwarded;

(II) with respect to written communications described in subsection (c)(1), the date the communication was received, the identities of the sender and addressee, and the subject of the communication; and

(III) with respect to oral communications described in subsection (c)(2), the date on which the communication occurred, the participants in the conversation or meeting, and the subject of the communication.

(ii) TRANSPARENCY.—The log of communications described in clause (i) shall be made publicly available in accordance with section 552 of title 5, United States Code (commonly known as the ''Freedom of Information Act'').

(3) PUBLICATION OF INFORMATION.—If, as a result of a communication with an official of the Department of Homeland Security, a person or entity inquiring about a specific case or generally about the regional center program described in section 203(b)(5)(E) of the Immigration and Nationality Act received generally applicable and non-case specific information about program requirements or administration that has not been made publicly available by the Department, the Director of U.S. Citizenship and Immigration Services, not later than 30 days after the communication of such information to such person or entity, shall publish such information

on the U.S. Citizenship and Immigration Services website as an update to the relevant Frequently Asked Questions page or by some other comparable mechanism.

(f) PENALTY.—

(1) IN GENERAL.—Any person who violates the prohibition on preferential treatment under this section or intentionally violates the reporting requirements under subsection (c) shall be disciplined in accordance with paragraph (2).

(2) SANCTIONS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Homeland Security shall establish a graduated set of sanctions based on the severity of the violation referred to in paragraph (1), which may include, in addition to any criminal or civil penalties that may be imposed—

(A) written reprimand;

(B) suspension;

(C) demotion; or

(D) removal.

(g) RULE OF CONSTRUCTION.—Nothing in this section may be construed to modify any law, regulation, or policy regarding the handling or disclosure of classified information.

(h) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

Appendix 1

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

June 3, 2015

The Honorable Patrick Joseph Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: EB-5 Regional Center Program: Job Creation Methodology

Dear Senator Leahy:

We write to you on behalf of the American Immigration Lawyers Association (AILA) and AILA's EB-5 Committee, with the understanding that some Members of Congress and others may be seeking information regarding whether the counting of indirect and induced jobs is an acceptable manner of determining job creation caused by new capital investments in the local economy, both generally, and in particular as used in the EB-5 Regional Center Program. AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Part of the mission of AILA's EB-5 Committee is to monitor the administration of the EB-5 Program by U.S. Citizenship and Immigration Services (USCIS). The EB-5 Committee also seeks to collaborate proactively with USCIS and elected representatives to ensure that the EB-5 Program operates lawfully, efficiently, and with integrity.

We write this letter to provide background regarding:

1. The legal context for counting indirect job creation in the EB-5 Regional Center Program and USCIS's adjudication practices respecting indirect job creation;

2. The U.S. federal and state governments' regular use of indirect and induced job creation modeling, affirming the acceptance of indirect job creation as a tool for measuring economic impacts of proposed projects; and

3. The negative impact that eliminating or restricting the use of indirect or induced jobs in the EB-5 program would have on small investment projects.

Legal Context

Pursuant to USCIS regulations at 8 CFR §§204.6(m)(1), (7), the EB-5 Regional Center Program allows investors to satisfy the job creation requirements of the EB-5 Program based on new jobs created directly in the new commercial enterprise, and new indirect and induced jobs created in

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the local economy. Section 610 of Public Law 102-395 (Oct. 6, 1992) (as amended) and existing USCIS regulations require that direct, indirect, and induced job creation in EB-5 visa petitions sponsored by EB-5 Regional Centers be determined through reasonable methodologies. Pursuant to 8 CFR §§204.6(m)(3)(ii), each EB-5 Regional Center must provide verifiable detail as to how jobs will be created indirectly.

In practice, the only "reasonable methodologies" that USCIS accepts are well-established and verifiable Input-Output economic models. There are three or four dominant models including the Regional Input-Output Modeling System (known as RIMS II) administered by the Bureau of Economic Analysis, and the Impact Analysis for Planning data (known as IMPLAN), an impact modeling system originally developed under the USDA Forest Service. We discuss RIMS II and IMPLAN in Section 2 of this letter.

USCIS imposes important restrictions on crediting investors with direct, indirect, and induced jobs determined by reasonable methodologies. For example, USCIS does not permit investors to count direct construction-phase jobs unless the project has a construction timeline of two or more years. Where construction is claimed to take two or more years, USCIS requires independent evidence to verify the reasonableness of the construction timeline. Similarly, USCIS requires independent evidence to verify the reasonableness of construction budget figures that are used as inputs in reasonable economic methodologies, and disallows the use of a number of common construction budget line items as inputs to the Input-Output models, thereby restricting the number of jobs. Further, USCIS prohibits investors from counting jobs from future tenants of a building constructed with EB-5 capital unless a clear nexus is established between the EB-5 capital and tenant operations, and the petitioner establishes that the new tenants are not merely relocated from another location.

The law recognizes that indirect as well as direct jobs may be counted and allows reasonable methodologies to establish the number of such jobs in the EB-5 Regional Center Program, as Congress contemplated pooled investment would have larger regional impacts than investment based on a single investor or entrepreneur. To more accurately measure these greater impacts, Congress called upon the immigration agency to establish "reasonable methodologies" to count all job creation attributable to the pooled investment in the economy – that is, the sum of direct, indirect, and induced jobs among "other positive economic effects."

History of RIMS II and IMPLAN

Although we are unaware of any data tracking the different methodologies or models used in the EB-5 Regional Center Program, based on the collective experience of the EB-5 Committee, RIMS II appears to be the most prevalent model. RIMS II was developed by the U.S. Department of Commerce (Bureau of Economic Analysis) in the 1970s. RIMS II has been used ever since as a key tool by federal, state, and local governments when determining job creation

or job losses from events impacting local economies.[1] According to the Bureau of Economic Analysis:

> *RIMS II is already widely used in both the public and private sectors for estimating the economic impact of an event, construction project, or other change in a local economy. In the public sector, for example, state and local government officials use BEA's regional modeling system to estimate the regional impacts of military base closings… airport construction and expansion…. development of shopping malls and sports stadiums*.[2]

IMPLAN (IMpact analysis for PLANning) is another dominant model used in the EB-5 Regional Center Program to measure indirect and induced jobs. Like RIMS II, IMPLAN also arose from the federal government's need to accurately determine both job creation and job loss from events impacting the local economy. IMPLAN was originally developed in 1976 by the USDA Forest Service to study forestry management for the U.S. federal government. From 1984 to 1988, in partnership with the University of Minnesota, the data, and technical support for the program became available to all users. Eventually, the success of IMPLAN allowed the data and support to be provided by a private company named Minnesota IMPLAN Group, Inc. In 2009, IMPLAN was designated as an acceptable way to track new job growth for the American Recovery and Reinvestment Act (ARRA) program.[3]

RIMS II and IMPLAN are both input-output models that at their core examine the interrelationships between industries. Harvard Professor Wassily Leontief pioneered the fundamental research establishing input-output modeling for measuring economic impacts. Professor Leontief was awarded the Nobel Prize in Economics in 1973 for developing input-output models to study how economic changes in one part of the economy affect other parts of the economy.[4] Professor Leontief's models comprise the backbone for tools used generally and in the EB-5 Regional Center Program for measuring job creation and other economic impacts arising from a single stimulus or project.

The origin and use of RIMS II and IMPLAN methodologies by U.S. federal and state governments establish that (1) a full assessment of economic impacts must take indirect and

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[1] *See* Bureau of Economic Analysis, "RIMS II: An Essential Tool for Regional Developers and Planners (RIMS II User's Guide)," (Dec. 2013), www.bea.gov.
[2] *See* U.S. Department of Commerce, "BEA Tool Allows Businesses to Estimate the Economic Impact of Disasters," (Apr. 21, 2015), www.commerce.gov.
[3] *See* History of IMPLAN, www.implan.com.
[4] *See* Wassily Leontief, Ed., *Input-Output Economics*, 2nd ed. (New York: Oxford University Press, 1986); Steven Landefeld & Stephanie McCulla, "Wassily Leontief and His Contributions to Economic Accounting," *Survey of Current Business* (Mar. 1999); "Wassily Leontief – Biographical," The Nobel Prize Foundation, www.nobelprize.org; Michael L. Lahr and Erik Dietzenbacher, Eds., *Wassily Leontief and Input-Output Economics* (Cambridge University Press: 2008).

induced job creation into account; and (2) input-output models have a firm foundation and the federal government has had an active role in developing and using these methods to determine the total job creation impact of capital investments.

Negative Consequences from Eliminating or Restricting Indirect and Induced New Jobs

The widely recognized accuracy of Input-Output economic models such as RIMS II, IMPLAN and similar methodologies enable EB-5 Regional Center investment projects to reliably determine the total job creating impact of capital investment projects on the local economy. Any improvements that can be made in job creation determination using Input-Output models through refinement of the evidence used for economic analyses can only result in more robust results built upon an already solid foundation, thereby offering welcome, though marginal, gains.

Preventing EB-5 investors from counting indirect and induced jobs would, on the other hand, have the effect of extraordinarily limiting the ability of EB-5 investors to access small scale capital investment and other projects. Two types of EB-5 projects would be especially harmed by eliminating or restricting the counting of indirect and induced jobs within the EB-5 Program:

(1) Small capital investment projects that have modest capital investment budgets and a comparatively high reliance on EB-5 investors to contribute financing. For example, start-up businesses, small family-owned hotels, restaurants, production businesses and small farm projects, would all be severely restricted in their ability to raise EB-5 capital if indirect and induced jobs were limited or excluded from the EB-5 Program.

(2) Any capital investment project involving new construction that has a construction timeline of less than two years would only be able to raise a fraction of EB-5 capital it is currently able to raise where direct, indirect and induced impacts are all counted.

All of these projects have important capital costs, but consistently face limited access to domestic capital sources – especially from bank financing and for new construction – and they only create sufficient direct jobs to satisfy the job creation requirements of a handful of EB-5 investors. This inevitably leaves a gap in financing that will cripple the development of such smaller projects. Paradoxically, eliminating or limiting the use of indirect and induced jobs in the EB-5 Program would produce marginal improvements in the accuracy of job creation determinations, while severely harming the use of EB-5 capital, particularly in smaller projects, which are precisely the kinds of projects best suited for areas suffering from poverty and long-term high unemployment.

We are pleased to include in **Attachment "A"** detailed examples of over 100 economic impact and job creation studies for projects across the United States that accurately, robustly and successfully incorporate indirect and induced jobs. This large sample of economic job creation

studies were not drawn from the EB-5 Regional Center Program, but rather were conducted for a multitude of economic development and planning purposes by federal, state and local entities. The sample of economic impact and job creation studies was obtained from publicly available sources and cites the website for each source. The large majority of economic impact and job creation studies surveyed were conducted using RIMS II or IMPLAN job creation methodologies, thereby confirming the widespread use of these methodologies by governments and institutions across the nation. In all of the economic job creation studies surveyed in Attachment "A," the economists included indirect and induced jobs in the job creation determinations, which verifies the prevalent and accepted use of indirect and induced job creation determinations in economic impact studies throughout the United States in both EB-5 and non-EB-5 contexts.

Conclusion

We hope that the foregoing assures you and others interested in the EB-5 Regional Center Program that indirect and induced job creation is a valid measure of total job creation impacts of any capital investment project, including EB-5 projects. There is a small handful of accepted methods EB-5 projects use to measure indirect jobs, and among those, RIMS II and IMPLAN predominate. Both are input-output models originally developed under the direction of U.S. federal agencies. USCIS adjudicates the reasonableness of methodologies used to count indirect and induced impacts in a highly conservative manner, excluding categories of inputs and impacts economists generally would include as valid components of a job study.

The EB-5 Committee would be pleased to provide further background material, if that would be helpful. Please contact Bob Sakaniwa, Senior Associate Director of AILA Advocacy at (202) 507-7642, or by e-mail at bsakaniwa@aila.org.

Thank you very much for your consideration of this important issue.

Sincerely,

Leslie Holman
AILA President

David Morris, Esq.
Chair, AILA EB-5 Committee

Encl: Attachment "A"

No.	U.S. STATE	STATE RELIED ON INPUT-OUTPUT ECONOMIC METHODOLOGY? YES/NO	INDUSTRY SECTOR	ECONOMIC MODEL USED?	DIRECT JOBS COUNTED? YES/NO	INDIRECT JOBS COUNTED? YES/NO	INDUCED JOBS COUNTED? YES/NO	WEBLINK TO STUDY
1	Alabama	Yes	Regions Financial Corporation	IMPLAN	Yes	Yes	Yes	http://www.regions.com/virtualdocuments/Economic_Impact_Study_2012.pdf
2	Alaska	Yes	Pebble Mine	RIMS II	Yes	Yes	Yes	http://corporate.pebblepartnership.com/files/documents/study.pdf
3	Alaska	Yes	Puget Sound Region's Economy	IMPLAN	Yes	Yes	Yes	http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=771809fb-2de8-4221-a8e8-98feb840d6d8
6	Arizona	Yes	Bioscience Industry	IMPLAN	Yes	Yes	Yes	http://www.flinnscholars.org/file/final_az_biosciimpact.pdf
7	Arizona	Yes	Military Operations	IMPLAN	Yes	Yes	Yes	http://www.dm.af.mil/shared/media/document/afd-110822-041.pdf
8	Arkansas	Yes	University of Arkansas Medical School	IMPLAN	Yes	Yes	Yes	http://www.uamshealth.com/upload/docs/Institutional%20Data/Impact-Study.pdf
9	Arkansas	Yes	Entergy Corp.	IMPLAN	Yes	Yes	Yes	http://www.entergy-arkansas.com/content/economic_development/docs/EAI_Impact_Study.pdf
10	Arkansas	Yes	Fayetteville Shale	IMPLAN	Yes	Yes	Yes	http://cber.uark.edu/files/Revisiting_the_Economic_Impact_of_the_Fayetteville_Shale.pdf
11	California	Yes	University of CA, Riverside	IMPLAN	Yes	Yes	Yes	https://www.ucr.edu/economicimpact/pdf/eip.pdf
12	California	Yes	West Coast Ports	RIMS II	Yes	Yes	Yes	http://www.pmanet.org/wp-content/uploads/2014/06/West-Coast-Ports-Economic-Impact-and-Competitiveness.pdf
13	California	Yes	Infrastructure Investment	Other	Yes	Yes	Yes	http://www.bayareaeconomy.org/media/files/pdf/P3-CaliforniaInfrastructureUpdateWhitePaper2012Jan.pdf
14	Colorado	Yes	Solar Industry	NREL JEDI	Yes	Yes	Yes	http://solarcommunities.org/wp-content/uploads/2013/10/TSF_COSEIA-Econ-Impact-Report_FINAL-VERSION.pdf
15	Colorado	Yes	Craft Brewers Industry	IMPLAN	Yes	Yes	Yes	https://www.brewersassociation.org/attachments/0000/9192/Colorado_Brewers_Guild_Economic_Impact_Study_04-21-12.pdf
16	Colorado	Yes	Colorado's Higher Education	RIMS II	Yes	Yes	Yes	http://highered.colorado.gov/Publications/Studies/2007/200712_ImpactofHE.pdf
17	Connecticut	Yes	Recycling Industry	IMPLAN	Yes	Yes	Yes	http://www.ct.gov/deep/lib/deep/waste_management_and_disposal/solid_waste/transforming_matls_mgmt/gov_recycling_work_group/appendix_i.pdf
18	Delaware	Yes	Agricultural Industry	IMPLAN	Yes	Yes	Yes	http://ag.udel.edu/deagimpact/AgInDeEconB.pdf
19	Delaware	Yes	Motiva Enterprises DE City Refinery	REMI	Yes	Yes	Yes	http://archive.delawareonline.com/assets/pdf/BL12758821.PDF
20	Delaware	Yes	Port of Wilmington	RIMS II	Yes	Yes	Yes	http://www.portofwilmington.com/HTML/our_port/portofwilmington_economicimpactstudy2011.pdf
21	District of Columbia	Yes	Building Energy Rating & Disclosure Po	IMPLAN	Yes	Yes	Yes	http://www.peri.umass.edu/fileadmin/pdf/other_publication_types/PERI-IMT-2012-Analysis_Job_Creation.pdf
22	District of Columbia	Yes	Metropolitan Washington Airports	IMPLAN	Yes	Yes	Yes	http://www.metwashairports.com/file/2012_Economic_Impact_Study.pdf
23	District of Columbia	Yes	Potential Economic Impact for Hosting	IMPLAN, WBOC	Yes	Yes	Yes	https://www.ubalt.edu/jfi/jfi/reports/Olympics2012.PDF
24	Florida	Yes	Tourism Industry	REMI	Yes	Yes	Yes	http://floridataxwatch.org/resources/pdf/2013TourismFINAL.pdf
25	Florida	Yes	Aerospace Industry	IMPLAN	Yes	Yes	Yes	http://www.cefa.fsu.edu/content/download/110545/1027484/file/Final%20Space%20Florida%20Report%203-14-11.pdf
26	Georgia	Yes	Aerospace Industry	IMPLAN	Yes	Yes	Yes	http://www.georgia.org/wp-content/uploads/2014/03/Aerospace-Economic-Impact-Study.pdf
27	Georgia	Yes	Music Industry	IMPLAN	Yes	Yes	Yes	http://www.georgia.org/wp-content/uploads/2013/09/Georgia-Music-Business-Economic-Impact-Study2011.pdf
28	Hawaii	Yes	Marine Corps Base	IMPLAN	Yes	Yes	Yes	http://www.mcbhawaii.marines.mil/Portals/114/WebDocuments/PublicAffairs/Economic%20Impact%20Analysis.pdf
29	Illinois	Yes	Solar Photovoltaics Industry	JEDI, IMPLAN	Yes	Yes	Yes	http://renewableenergy.illinoisstate.edu/downloads/publications/FINAL%20Solar%20Economic%20Impact%20Report%20Dec%202013.pdf
30	Indiana	Yes	Indiana University	IMPLAN	Yes	Yes	Yes	http://innovateindiana.iu.edu/docs/economic_impact_study.pdf
31	Indiana	Yes	Wind Power Industry	JEDI, IMPLAN	Yes	Yes	Yes	http://www.nrel.gov/docs/fy14osti/60914.pdf
32	Indiana	Yes	Tourism Industry	IMPLAN	Yes	Yes	Yes	http://www.visitindianatourism.com/sites/default/files/documents/2012-Economic-Impact-Of-Tourism-In-Indiana.pdf
33	Iowa	Yes	Recycling Industry	IMPLAN	Yes	Yes	Yes	http://www.epa.gov/epawaste/conserve/tools/rmd/rei-rw/pdf/iowa.pdf
34	Iowa	Yes	Solar Industry	IMPLAN	Yes	Yes	Yes	http://votesolar.org/wp-content/uploads/2011/03/Iowa-SolarJobs-Report.pdf
35	Kansas	Yes	Wind Power Industry	JEDI	Yes	Yes	Yes	http://www.polsinelli.com/~/media/Articles%20by%20Attorneys/Anderson_Gibson_Hagedorn_Feb_2014
36	Kansas	Yes	National Bio & Agro-Defense Facility	Impact DataSource	Yes	Yes	Yes	https://www.k-state.edu/nbaf/documents/NBAF%20Economic%20Impact%20Report.pdf
37	Maryland	Yes	American Recovery & Reinvestment A	StateStat	Yes	Yes	Yes	http://statestat.maryland.gov/recoveryjobs.asp
38	Maryland	Yes	Defense Base Closure & Realignment (	BRAC STAT	Yes	Yes	Yes	http://business.maryland.gov/Documents/ResearchDocument/BRACJobsSummary2014.pdf
39	Maryland	Yes	Technology Development Corp.	IMPLAN	Yes	Yes	Yes	http://tedco.md/wp-content/uploads/2014/01/TEDCOEconomicImpactStudy2013ExecutiveSummary.pdf
40	Maryland	Yes	Art & Entertainment Industry	IMPLAN	Yes	Yes	Yes	http://www.towson.edu/innovation/resi/downloads/MSAC%20impact%20analysis%20final%20web.pdf
41	Massachusetts	Yes	Port of Boston	RIMS II	Yes	Yes	Yes	https://www.massport.com/media/261138/massport_final_report_17july2014_updated.pdf
42	Michigan	Yes	Michigan Food Processing Industries	IMPLAN, MEDC	Yes	Yes	Yes	https://www.michigan.gov/.../foodprocessing1_335931_7.doc
43	Michigan	Yes	Transportation Investment Packages	REMI	Yes	Yes	Yes	http://www.michigan.gov/documents/mdot/MDOT_SLRP_Economic_Impact_Analysis_200445_7.pdf
44	Minnesota	Yes	Projects Leverages by MN Rehabilitatic	IMPLAN	Yes	Yes	Yes	http://www.mnhs.org/shpo/grants/docs_pdfs/Economic_Impact-Historic_Tax_Credit_2011.pdf
45	Minnesota	Yes	Residential Building Energy Codes	IMPLAN	Yes	Yes	Yes	http://www.pnnl.gov/main/publications/external/technical_reports/PNNL-21538.pdf

No.	U.S. STATE	STATE RELIED ON INPUT-OUTPUT ECONOMIC METHODOLOGY? YES/NO	INDUSTRY SECTOR	ECONOMIC MODEL USED?	DIRECT JOBS COUNTED? YES/NO	INDIRECT JOBS COUNTED? YES/NO	INDUCED JOBS COUNTED? YES/NO	WEBLINK TO STUDY
46	Minnesota	Yes	Corn & Ethanol Industry	IMPLAN	Yes	Yes	Yes	https://www.mda.state.mn.us/news/publications/renewable/ethanol/cornethanolecon2008.pdf
47	Mississippi	Yes	Poultry Industry	ERS data	Yes	Yes	Yes	http://www.thepoultrysite.com/articles/2495/the-mississippi-poultry-industry-and-its-economic-impact/
48	Missouri	Yes	Missouri Statewide Airports	IMPLAN	Yes	Yes	Yes	http://www.modot.org/othertransportation/aviation/documents/Missouri-2012-Economic-Impact.pdf
49	Montana	Yes	Clean Energy Production Industry	JEDI, IMPLAN	Yes	Yes	Yes	http://meic.org/wp-content/uploads/2014/06/Synapse-Montana-Jobs-Final-6-5-145.pdf
50	Nebraska	Yes	Ethonal Production Industry	IMPLAN	Yes	Yes	Yes	http://agecon.unl.edu/documents/2369805/0/Economic+Impacts+of+the+Ethanol+Industry+in+Nebraska+PRINT.pdf/bbebec11-bc7c-4f37-a0e1-5b1077a5447d
51	Nebraska	Yes	Travel Industry	IMPLAN	Yes	Yes	Yes	http://www.deanrunyan.com/doc_library/NEImp.pdf
52	Nevada	Yes	Mining Industry	IMPLAN	Yes	Yes	Yes	http://www.nevadamining.org/issues_policy/pdfs/NMA-Brief05-Economic%20Impact%20Summary.pdf
53	Nevada	Yes	Commercial Casino Industry	AGA Survey	Yes	Yes	Yes	http://www.americangaming.org/sites/default/files/uploads/docs/final_final_brattle_study_2-3-12.pdf
54	Nevada	Yes	Tourism Industry	IMPLAN	Yes	Yes	Yes	http://www.appliedanalysis.com/projects/lvcvaeis/LVCVA-EIS-0313.pdf
55	New Hampshire	Yes	Balsams Grand Resort & Wilderness S	IMPLAN	Yes	Yes	Yes	http://mediad.publicbroadcasting.net/p/nhpr/files/201503/03.02.15_The_Balsams_Economic_Impact.pdf
56	New Hampshire	Yes	Passanger Rail Expansion in NH	TREDIS model	Yes	Yes	Yes	http://www.edrgroup.com/pdf/NH-PassRail-Economic-Impact-Memo.pdf
57	New Hampshire	Yes	Construction of High-Voltage Transmi	IMPLAN, RIMS II, RE	Yes	Yes	Yes	http://s3.documentcloud.org/documents/286344/npt-employment-impacts-final-version.pdf
58	New Hampshire	Yes	Manufacturing & High-Tech Industries	Other	Yes	Yes	Yes	http://www.ampednh.com/sites/default/files/smrtmfgfinal.pdf
59	New Mexico	Yes	Tourism Industry	REIS	Yes	Yes	Yes	http://www.santafe.org/images/Embed/2651-Economic%2520Impact%2520of%2520Tourism-Santa%2520Fe%2520County.pdf
60	New Mexico	Yes	Roca Honda Uranium Mine	IMPLAN	Yes	Yes	Yes	http://masecoalition.org/wp-content/uploads/2015/05/Roca-Honda-Mine-Economic-Study-Final.pdf
61	New York	Yes	Going Green Industry	IMPLAN	Yes	Yes	Yes	file:///C:/Users/elizabeth/Downloads/2013-gjgny-phase2.pdf
62	New York	Yes	Tourism Industry	IMPLAN	Yes	Yes	Yes	http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/tourism/nys-tourism-impact-2012-v1.0.pdf
63	New York	Yes	New York University	IMPLAN	Yes	Yes	Yes	http://www.nyu.edu/content/dam/nyu/govCommunAffairs/documents/NYU_Economic_Impact_Final_Report.pdf
64	North Carolina	Yes	Bioscience Industry	IMPLAN	Yes	Yes	Yes	https://www.ncbiotech.org/sites/default/files/articles/NCBiotech_2012_full_report.pdf
65	North Carolina	Yes	Charlotte Region's Engery Industry	EMSI, IMPLAN	Yes	Yes	Yes	http://charlottechamber.com/clientuploads/Economic_pdfs/Charlotte_Energy_Impact.pdf
66	Ohio	No	Wyandot County, OH	IMPLAN	Yes	Yes	Yes	http://comdev.osu.edu/sites/comdev/files/imce/Economic%20Impact%20Analysis%20Program%20-%20Wyandot%20County%20EIA%202014%20Report.pdf
67	Oklahoma	Yes	Proposed Regional Mall Development	IMPLAN	Yes	Yes	Yes	http://www.cityofyukonok.gov/sites/yukon2/uploads/images/YEDA/Three_Rivers_Regional_Mall.pdf
68	Oregon	Yes	Intel's Oregon Operations	IMPLAN	Yes	Yes	Yes	http://www.intel.com/content/dam/www/public/us/en/documents/reports/intel-oregon-economic-impact-report.pdf
69	Oregon	Yes	Travel Industry	IMPLAN	Yes	Yes	Yes	http://www.deanrunyan.com/doc_library/ORImp.pdf
70	Pennsylvania	Yes	Biotechnology Center in Bucks County	RIMS II	Yes	Yes	Yes	http://pabiotechbc.org/press/pdf/PA_Biotech_Center_Economic_Impact_Study_2013.pdf
71	Pennsylvania	Yes	Steel Industry	IMPLAN	Yes	Yes	Yes	http://www.alleghenyconference.org/PennsylvaniaEconomyLeague/PDFs/EconomicImpactAnalyses/EconomicImpactOfSteelIndustryInPa1011.pdf
72	Pennsylvania	Yes	Homecare & Hospice Industry	IMPLAN	Yes	Yes	Yes	http://ccedcpa.com/wp/wp-content/uploads/2013-pa-home-care-state-of-the-industry-report.pdf
73	Pennsylvania	Yes	PennEast Pipeline Project	IMPLAN	Yes	Yes	Yes	http://www.ugicorp.com/files/doc_news/subsidiary/PENNEAST-PIPELINE-PROJECT-ECONOMIC-IMPACT-ANALYSIS.PDF
74	Rhode Island	Yes	Proposed South Street Power Station	IMPLAN	Yes	Yes	Yes	http://www.brown.edu/web/documents/06-2013-AppleseedSSPS.pdf
75	Rhode Island	Yes	Defense Sector	RIMS II	Yes	Yes	Yes	http://www.rilin.state.ri.us/Reports/2014%20-%20Defense%20Report%20%20-%20Final%20-%2007072014.pdf
76	South Carolina	Yes	Automotive Industry	NETS, IMPLAN	Yes	Yes	Yes	http://mooreschool.sc.edu/UserFiles/moore/Documents/rev1_19.pdf
77	South Carolina	Yes	Manufacturing Industry	IMPLAN	Yes	Yes	Yes	http://www.myscma.com/public_docs/ManufacturingReport_Final.pdf
78	South Carolina	Yes	BMW Industry	IMPLAN	Yes	Yes	Yes	http://mooreschool.sc.edu/UserFiles/moore/Documents/Division%20of%20Research/BMWmay.pdf
79	South Dakota	Yes	Agriculture Industry	IMPLAN	Yes	Yes	Yes	https://www.sdstate.edu/econ/commentator/upload/No523.pdf
80	South Dakota	Yes	Vineyard & Winery Industries	RIMS II	Yes	Yes	Yes	http://www.extension.umn.edu/community/economic-impact-analysis/reports/docs/2014-vineyards-wineries-dakotas.pdf
81	Tennessee	Yes	Foreign Direct Investment in Nashville	IMPLAN, EMSI	Yes	Yes	Yes	http://www.nashvillechamber.com/docs/default-source/research-center-studies/foreign-direct-investment-in-the-nashville-region.pdf?sfvrsn=2
82	Tennessee	Yes	Community Health Center Industry	IMPLAN	Yes	Yes	Yes	http://www.tnpcaeducation.org/resourcelibrary/datareports/TennesseeEconomicImpactReport2008.pdf
83	Tennessee	Yes	Going Green Industry	IMPLAN	Yes	Yes	Yes	https://www.serdc.org/Resources/Documents/2014%20Documents/MTSU%20Green%20Jobs%20Study%20%281%29.pdf
84	Texas	Yes	Travel Industry	RTIM models	Yes	Yes	Yes	http://www.deanrunyan.com/doc_library/TXImp.pdf
85	Texas	Yes	Energy Tower in Midland, TX	IMPLAN	Yes	Yes	Yes	http://www.recenter.tamu.edu/mdata/pdf/Midland_Midland_EDC_Energy_Tower.pdf
86	Texas	Yes	Tourism Industry on Galveston Island,	IMPLAN	Yes	Yes	Yes	http://galvestonparkboard.org/pdf/Economic_Impact_of_Tourism_on_Galveston_Island_Final_05142014.pdf
87	Texas	Yes	Wind Energy Industry	JEI, IMPLAN	Yes	Yes	Yes	http://www.nrel.gov/docs/fy11osti/50400.pdf
88	Utah	Yes	Salt Lake City International Airport	IMPLAN	Yes	Yes	Yes	http://www.slcairport.com/cmsdocuments/Economic_Impact_Analysis_GSBS-Richman_2013.pdf
89	Utah	Yes	Life Science's Industry	IMPLAN	Yes	Yes	Yes	http://www.innovationutah.com/assets/Accelerating-Utahs-Life-Science-Industry-UCAP-Strategy-small.pdf

No.	U.S. STATE	STATE RELIED ON INPUT-OUTPUT ECONOMIC METHODOLOGY? YES/NO	INDUSTRY SECTOR	ECONOMIC MODEL USED?	DIRECT JOBS COUNTED? YES/NO	INDIRECT JOBS COUNTED? YES/NO	INDUCED JOBS COUNTED? YES/NO	WEBLINK TO STUDY
90	Vermont	Yes	Hotel Roanoke & Conference Center	IMPLAN	Yes	Yes	Yes	https://www.vtnews.vt.edu/articles/2015/04/042315-vtf-hotelimpact-pdf.pdf
91	Virginia	Yes	Aerospace Industry	IMPLAN	Yes	Yes	Yes	http://www.doav.virginia.gov/Downloads/Studies/Workforce/Aerospace%20Impact%202010%20ADA.pdf
92	Virginia	Yes	Virginia Tech Football Program	RIMS II	Yes	Yes	Yes	https://www.vtnews.vt.edu/articles/2015/04/042315-outreach-football-pdf.pdf
93	Virginia	Yes	Wine&Grapes Industry	IMPLAN	Yes	No	No	http://www.virginiawine.org/system/docs/47/original/Virginia_2010_EI_Update_Draft_3.pdf?1328208264
94	Virginia	Yes	Fort Lee	IMPLAN	Yes	Yes	Yes	http://virginialmi.com/content/pdfs/research_2002-07_ftlee.pdf
95	Virginia	Yes	Commercial Fishery Industries	RIMS II, IMPLAN, RE	Yes	Yes	Yes	https://www.wm.edu/as/publicpolicy/documents/prs/jlarc1.pdf
96	Virginia	Yes	Port of Virginia	IMPLAN	Yes	Yes	Yes	http://www.portofvirginia.com/pdfs/POV%20Econ%20Impact%20Study%202014.pdf
97	Washington	Yes	Aerospace Industry	RIMS II	Yes	Yes	Yes	http://www.psrc.org/assets/10090/CAI_WAP_Impact_Estimates_2013_10-2-13_FINAL.pdf
98	Washington	Yes	University of Washington	IMPLAN	Yes	Yes	Yes	http://www.wsac.wa.gov/sites/default/files/UWImpactReport.pdf
99	West Virginia	Yes	Forresting Industry	IMPLAN	Yes	Yes	Yes	http://www.wvforestry.com/Economic%20Impact%20Study.pdf
100	West Virginia	Yes	North Central WV Technology Industr	IMPLAN	Yes	Yes	Yes	http://www.affiliateservices.org/WVHTF/media/Wvhtc/Documents/Economic-Impact-of-Technology-FINAL.pdf
101	West Virginia	Yes	Mountain Valley Pipeline Project	IMPLAN	Yes	Yes	Yes	http://mountainvalleypipeline.info/wp-content/uploads/2014/12/Mountain_Valley_Pipeline_West_Virginia_Report_10Dec2014.pdf
102	Wisconsin	Yes	Tourism Industry	IMPLAN, REIS	Yes	Yes	Yes	http://www.visitwalworthcounty.com/expenditures/2013%20Wisconsin%20Economic%20Impact.pdf
103	Wisconsin	Yes	Beef Cattle Industry	IMPLAN	Yes	Yes	Yes	http://www.beeftips.com/CMDocs/WisconsinBC/2014/SOI%20Wisconsin%202013%205-13-13.compressed.pdf
104	Wisconsin	Yes	Biosience Industry	IMPLAN, REMI	Yes	Yes	Yes	http://c.ymcdn.com/sites/www.bioforward.org/resource/resmgr/Industry_Analysis_docs_and_images/BioForward_Economic_Impact_S.pdf
105	Wyoming	Yes	Coal Industry	REMI, IMPLAN	Yes	Yes	Yes	http://www.uwyo.edu/cee/_files/docs/wia_coal_full-report.pdf
106	Wyoming	Yes	Statewide Airport Industry	IMPLAN	Yes	Yes	Yes	https://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Aeronautics/ENTIRE%20Wyoming%20econ%20report-2008-rev9.pdf
107	Wyoming	Yes	Oil & Gas Development in the West	IMPLAN	Yes	Yes	Yes	http://www.westernenergyalliance.org/wp-content/uploads/2012/05/Final-Combined-ES-Econ-Impacts-of-OG-Dev-on-Fed-Lands-in-the-West.pdf
108	Wyoming	Yes	Marcellus Shale Mining	IMPLAN	Yes	Yes	Yes	http://www.cbprogress.org/Economic%20Impacts%20in%20Wyoming%20County%202010.pdf

Appendix 2

AILA EB-5 COMMITTEE MEMORANDUM

RE: Senate Bill 1501—Imposition of Sanctions Without Due Process.

The issue is whether Senate Bill 1501 ("S. 1501") will deprive EB-5 recipients ("Recipients") or stakeholders of due process rights by imposing sanctions at the "unreviewable" discretion of the Secretary of Homeland Security (DHS) without an evidentiary hearing and judicial review procedural rights.

DUE PROCESS DEPRIVATIONS DUE TO IMPOSITION OF SANCTIONS WITHOUT A FAIR HEARING

In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established the now well-accepted criteria for ***determining the contours for an administrative hearing consistent with due process***. In reaching its holding in *Matthews v. Eldridge*, therefore, the Supreme Court of the United States adopted the approach to determine what procedures are required under the Due Process Clause when the government seeks to deprive an individual or a constitutionally protected interest.

Under the *Matthews* test, identification of the specific dictates of due process generally requires consideration of three distinct factors that must be balanced: First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and third the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

In the case of **S. 1501**, the *Matthews* standards compel, at a minimum, an evidentiary hearing where evidence may be discovered and presented, witnesses examined and cross-examined, and exculpatory evidence be disgorged. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (recognizing that "[t]he

fundamental requisite of due process of law is opportunity to be heard" and that "hearing must be at a meaningful time and in a meaningful manner"). *See also Transco SCC., Inc. of Ohio v. Freedman*, 639 F.2d 318, 321 (6th Cir. 1981), *cert. denied*, 454 U.S. 820 (1981) (***a party "dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing."***); *Art-Metal USA, Inc. v. Solomon*, 473 F. Supp. 1, 4 (D.D.C. 1978) ***("Due process of law requires that before a contractor may be blacklisted…he must be afforded specific procedural safeguards…"***). To comply with the *Matthews* standards sanctions must be reviewable to comply with constitutionally protected interests and procedural due process rights.

HEARINGS PROTECT RECIPIENTS' DUE PROCESS RIGHTS AND PROVIDES PROCEDURAL DUE PROCESS

An evidentiary hearing supports the second prong of the *Matthews* test. In addition, pursuant to the holding in *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970), the opportunity to be heard must be "tailored . . . to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." By providing hearings, sanctions can be challenged to compel DHS to identify and provide notice and present evidence supporting its adjudications. Overall, hearings help reduce the risk of erroneous deprivation and fraud by strengthening oversight, by requiring accountability, and by providing more transparency.

DUE PROCESS DEPRIVATIONS DUE TO LACK OF JUDICIAL REVIEW

Again, the authority of the Secretary of DHS increases because EB-5 Recipients will be deprived the opportunity to contest the sanctions imposed by the DHS Secretary at the Secretary's

"unreviewable discretion." This will open the door for possible abuse of its power of discretion or errors in the adjudication and imposition of sanctions. As previously discussed these procedures violate the *Matthews* standards. In addition, however, the Senate Bill 1501 provisions also violate the judicial review standards provided under Administrative Procedure Act ("APA"). The proposed sanctions scheme and future practices, policies, rules, criteria, interpretations of law, and conduct must provide for judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and any determination pertaining to sanctions must be subject to review under Chapter 7 of title 5, United States Code.[1] More specifically, judicial review must be provided under 5 U.S.C. § 706(2)(A) and (D) to set aside any sanctions that are "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law," or "without observance of procedures required by law." The sanctions proposed by Senate Bill 1501 violate APA Judicial Review procures because they: (1) impose severe sanctions without the disclosure of derogatory evidence; (2) impose serious sanctions causing irreparable harm without providing an opportunity to confront and respond to all evidence; (3) impose severe sanctions without holding an evidentiary hearing before a neutral arbiter; (4) impose severe sanction based upon factual conclusions that may be contradicted by the record; and (5) are subject to unreviewable discretion without judicial review due process rights. In its decision to impose sanctions, DHS may rely upon facts outside the record, secret evidence, unsubstantiated or uncorroborated allegations, hearsay testimony, and facts that are contradicted by the administrative record.

[1] Please note that H.R. 616, the "American Entrepreneurship and Investment Act of 2015," a companion House of Representatives EB-5 Bill specifically provides the right to judicial review under the APA, 5 U.S.C. Chapter 7, sections 701 to 706. This companion bill, therefore, provides and recognizes constitutionally protected judicial review procedural due process rights.

CONCLUSION

The Senate Bill 1501 proposed sanctions scheme without judicial and administrative review and procedures violate due process rights by: (1) possible relying on secret evidence and hearsay; (2) failing to disclose evidence in possession of the government that is favorable, (3) failing to permit an opportunity to review adverse evidence and the entire record relied upon by DHS, and respond to that evidence before imposing any sanctions; (4) failing to provide an opportunity to present evidence at a hearing before imposing any sanctions; (5) failing to provide an opportunity to present witnesses and cross-examine adverse witnesses at a hearing before imposing any sanctions; (6) failing to provide notice and an evidentiary hearing before an impartial adjudicator before imposing any sanctions; (7) failing to provide appropriate administrative and judicial appellate rights, (8) ignoring and/or failing to address evidence presented to the agency.

Imposing severe sanctions at the unreviewable discretion of the DHS Secretary is a depravation of the right to due process and violates the *Matthews* standards and the APA Judicial Review procures.

Appendix 3

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June 17, 2011

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United States Citizenship and Immigration Services
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Washington, DC 20529
Via e-mail: opefeedback@uscis.dhs.gov

Re: USCIS Proposal for Comment: Proposed Changes to USCIS's Processing of EB-5 Cases

The American Immigration Lawyers Association (AILA) submits the following comments in response to the May 19, 2011, proposal to facilitate the speedy processing of regional center-affiliated project pre-approval applications and regional center-affiliated investor I-526 petitions.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. AILA was founded in 1946 and is affiliated with the American Bar Association. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed EB-5 processing rules and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

The proposal articulated three "steps" that are intended to improve the EB-5 case adjudication process:

1. Provide for accelerated and premium processing of I-526 petitions and I-924 applications involving projects that are ready to get underway;
2. Create Specialized Intake Teams for the initial review of I-924 applications, with teams able to communicate directly with I-924 applicants in writing to address questions; and
3. Create an expert Decision Board for rendering decisions on I-924 applications, with the option of an in-person or telephonic interview to inform the Board's final decision where a notice of intent to deny has been issued.

USCIS's proposal is consistent with, and in furtherance of, President Obama's executive order of April 27, 2011, which calls upon each federal agency to streamline the delivery of services to its customers, as well as the President's initiative to encourage investment and entrepreneurship. While we wholeheartedly agree with the spirit and goals of USCIS's proposal, we respectfully recommend that the proposal be modified as explained below, in order to provide for greater clarity and efficiency.

Proposed Step 1

USCIS proposes to implement two types of priority processing, accelerated processing and premium processing, for "actual" I-924 applications and I-526 petitions. With regard to I-924 applications, USCIS states that there are two varieties: "actual" and "exemplar" applications. Actual I-924 applications are based on projects that are "shovel ready," whereas exemplar applications are based on projects that are not shovel ready but are presented in principle to USCIS for a preliminary determination of EB-5 compliance. Investor I-526 petitions are, by definition, based upon shovel ready projects.

Recommendation 1A: I-924 Applications Should be Separated Into "Actual" and "Hypothetical" Categories, and "Actual" Projects Should be Defined without Reference to the Term "Shovel Ready"

USCIS correctly distinguishes between projects that are ready to get underway using EB-5 investor funds and thus truly need the benefit of priority processing, versus projects that are in the concept stage and have no practical need for expeditious processing. However, the use of the term "shovel ready" to delineate between the two types of projects is problematic because there is no formal, technically precise definition of the term that would transparently indicate to all projects whether they would be deemed "actual" for purposes of priority processing. There are a number of factors that determine when a real estate development project is ready to place a shovel into the ground, which include but are not limited to obtaining permits, licenses, environmental clearances, execution of contracts, and preliminary fundraising. However, not all investment projects involve real estate development or construction, and for these projects, the term "shovel ready" would be both irrelevant and inaccurate. The term's ambiguity cuts against the aim of streamlining adjudications as it fails to give real, ready-to-go projects a certain means to expedite their applications and raise job-creating capital. Thus, while the term "shovel ready" may be sufficient in other situations, it is ill-suited for the EB-5 program.

In lieu of "shovel ready," we recommend that an "actual" project be defined as one that is ready to accept investors immediately under the EB-5 program, with its sole reason for delay being the pendency of USCIS adjudication. A project that is ready to accept investors immediately means one where the specifications and site location are finalized, a detailed business plan is completed, and specific offering documents are ready to be executed. This definition of "actual" is transparent, measurable, and easily understood by any project seeking to participate in the EB-5 program.

There are three types of USCIS adjudications that could delay an actual project:

1. The adjudication of an initial I-924 application for regional center designation that includes an actual project pre-approval request;
2. The adjudication of a subsequent I-924 application after the regional center's designation that includes an actual project pre-approval request (but does not seek to amend the regional center designation in any way); and
3. The adjudication of an actual investor's I-526 petition, with respect to which business realities require the use of investor funds to be contingent on approval of the I-526.

All three types of USCIS adjudications would be eligible for both accelerated and premium processing, since they all involve actual projects with identical urgency concerns.

Recommendation 1B: Once an Actual Project Is Pre-approved in an I-924 Application, an Approval Notice Should be Generated for the Actual Project Documents that Represents a Binding Decision

USCIS's proposal states that "[b]usiness plans, economic analysis, and I-526 documentation approved in an 'actual' I-924 application, if unchanged, will be given deference in the filing of associated I-526 petitions, and such petitions will be eligible for accelerated target processing times and for [premium processing service]." USCIS does not elaborate on the procedure by which an I-924 applicant would be notified of actual project approval, or by which those project documents would be given deference in the adjudication of an actual I-526. We recommend the following procedure: approval of actual project documents in an actual I-924 application should be formalized in an approval notice generated by USCIS (separate from and in addition to a regional center designation letter) that is binding on all parties. Absent fraud, as long as subsequently filed I-526 petitions affiliated with the approved project include a copy of the approval notice, along with proof that no changes have been made to the approved documents, the project documents should not be reevaluated at the I-526 stage.

Treatment of actual project approval as binding will ensure efficiency and reinforce the importance of the agency's involvement in project review. Such treatment would be akin to USCIS's procedure for blanket L-1 petitions, as set forth in 8 CFR §214.2(l), approved I-140 petitions, or approved labor certification applications. This promotes efficiency by enabling the adjudicator of the I-526 petition to focus exclusively on lawful source of funds and path of funds. It prevents the anomalous situation of adjudicators second guessing Specialized Intake Teams and Decision Boards. Finally, and very significantly, it creates assurance that if members of the developer community follow this prescribed procedure, they will have some certainty that projects can proceed as planned (as opposed to the present procedure whereby many project pre-approvals are questioned in the I-526 adjudication process).

For hypothetical projects, an approval notice should be binding with respect to any job creation methodologies and formulas presented within the hypothetical project documents, although the project documents themselves would be expected to change to reflect actual project details in the future.

Recommendation 1C: The Term "Hypothetical" Should be Used to Refer to All Non-Actual Projects

In the proposed changes, USCIS uses the term "exemplar" to refer to all non-actual projects, meaning those projects that are at the concept stage and are not ready to accept investors. We recommend that in lieu of the term "exemplar," USCIS use the term "hypothetical" to refer to all non-actual projects for the sake of clarity. USCIS has previously used the term "exemplar" to refer to a model I-526 petition containing actual project documents that would be submitted with an actual I-526 but does not identify a specific investor. Per the December 11, 2009 memorandum issued by Donald Neufeld, Acting Associate Director, Domestic Operations, "Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions," the submission and approval of an exemplar I-526 is meant to "facilitate the adjudication of an actual but identical Form I-526 petition."

Based on the understanding of an exemplar I-526 outlined in the December 11, 2009 memo, a number of regional centers have submitted and obtained approval of exemplar petitions. These regional centers have then used their exemplar approvals to file "actual but identical" I-526 petitions, resulting in streamlined I-526 adjudications because the exemplar project documents do not need to be readjudicated. To ensure that previously approved "exemplar" I-526 petitions will correctly be treated as approved "actual" projects, and not mistakenly treated as hypothetical projects that need to be reexamined at the I-526 adjudication stage, we recommend that the term "hypothetical" be used to refer to all non-actual projects going forward. Such nomenclature is precise and will avoid unnecessary confusion in light of prior term usage. All hypothetical projects would fall under regular processing.

Recommendation 1D: "Hybrid" I-924 Applications Should be Eligible for Accelerated and Premium Processing

Contrary to USCIS's proposal, we recommend that accelerated and priority processing be made available for what USCIS calls a "hybrid" I-924 application, meaning an application by a single regional center that presents both actual and hypothetical projects for pre-approval. To alleviate efficiency concerns, USCIS may wish to limit the number of hypothetical projects that can be included in a hybrid application, but the existence of a hypothetical project should not automatically push an I-924 application out of the priority channel if a regional center also presents an actual project with a legitimate need for expeditious processing. We believe that the proposed treatment of "hybrid" applications would lead to the unfair and inefficient consequence of forcing a regional center to file

two I-924 applications, at a fee of $6,230 per application, just to allow an actual project to receive priority treatment.

Recommendation 1E: I-526 Premium Processing Should be Made Available Not Only for Regional Center-Affiliated Projects, but Also for Stand-Alone (Non-Regional Center) Projects

Actual projects, whether or not affiliated with a regional center, face the same challenges with respect to timing and need for capital. Stand-alone (non-regional center) projects play an important role in the realization of the EB-5 program's job creation goals. In fact, almost 30 percent of all EB-5 visas issued in FY 2010 fall into the stand-alone/non-regional center category. A stand-alone project may involve an EB-5 investor investing in a troubled business, with the use of funds contingent on I-526 approval. The troubled business would face a struggle for survival until USCIS adjudicates the petition, and therefore the speedy adjudication of the stand-alone I-526 petition is of paramount importance both for the troubled business and the investor. USCIS's proposal is silent with regard to stand-alone I-526 projects, and therefore we recommend that stand-alone actual projects explicitly be included in the scope of the new accelerated and premium processing scheme, and not be prejudiced simply because they are not affiliated with a regional center.

Proposed Step 2

Recommendation 2A: USCIS Should Clarify the Possible Actions That May be Taken by the Proposed Specialized Intake Team

USCIS proposes the creation and implementation of "Specialized Intake Teams" that will handle initial review of I-924 applications, and may communicate directly with the I-924 applicant in writing to address identified questions or needs. We recommend that the function of the Specialized Intake Teams be clarified to state that they are empowered to take the following four possible actions:

1. Approve the I-924 application (and any project pre-approval application) as initially filed;
2. If supplemental information (and any project pre-approval application) is needed, make one request for information or documentation;
3. Approve the I-924 application based upon the supplemental information submitted; and
4. If unable to approve, forward the application to the Decision Board (Proposed Step 3), which will give the applicant written notice that sets forth issues to be resolved, schedule the applicant for a hearing in person or by phone to discuss the issues on the record, and then render a final decision.

Each one of these steps should occur within 15 days on premium processing cases. The first two steps should take place within the targeted processing times, and steps three and four (on non-premium processing cases) should take place within one month.

Recommendation 2B: The Specialized Intake Team Should be Comprised of One Immigration Service Officer and One Economist

Proposed Step 3

USCIS proposes to create an expert I-924 Decision Board that will be equipped to render final decisions on applications that present issues not resolved by the Specialized Intake Team. As part of its function, the Decision Board will have the authority to schedule an in-person or telephonic interview with an I-924 applicant before issuing a final decision. This interview procedure is limited to the circumstance in which the Decision Board has issued a Notice of Intent to Deny.

Recommendation 3A: The In-Person/Telephonic Interview Process Should Not be Limited to the Circumstance in Which a Notice of Intent to Deny Has Been Issued

To best facilitate the Decision Board's final decision, we recommend that the procedure be revised as follows: If the Specialized Intake Team is unable to approve the I-924 application, it will forward the application to the Decision Board. The Decision Board will give the I-924 applicant a notice in writing that sets forth issues to be resolved, schedule the applicant for a hearing in person or by phone to discuss the issues on the record, and then render a final decision. The scheduling should be within 15 days of receipt of the application on premium processing cases and within one month on accelerated processing cases. This would provide a more efficient use of resources and a more timely and streamlined procedure than the procedure set forth in the proposal.

Recommendation 3B: The Decision Board Should be Comprised of Four Individuals: (1) A Senior Immigration Service Officer Supported by (2) Legal Counsel, (3) an Economist, and (4) a Business Analyst or Economic Development Specialist

To clarify, an "Economic Development Specialist" refers to an individual who would assist the I-924 Decision Board by providing the following:

1. Analysis of local economic development initiatives throughout the U.S., and strategic direction on how EB-5 program policies can further the nation's overall economic development goals in a highly competitive global environment for international investments;
2. Direction on how EB-5 program outreach can effectively encourage participation from more geographic areas throughout the U.S. so that the economic benefit of the program can have a greater impact;

3. Focused proposals on how the EB-5 program can partner with local (e.g. city-wide) economic development programs to intensify the positive effect of EB-5 investments;
4. Reports on how EB-5 investments are achieving economic development, based on the analysis of data from specific projects that are funded with EB-5 investment capital; and
5. Consolidated guidelines to assist adjudicators with identifying and assessing feasibility factors and real-world economic development ramifications of regional center and I-526 business plans.

Recommendation 3C: It Should be Clarified That Any Final USCIS Adjudication on an I-924 Application, whether by the Specialized Intake Team or by the Decision Board, Carries the Same Weight

Conclusion

AILA appreciates the opportunity to comment on these proposed EB-5 operational changes and we look forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

U.S. Citizenship and Immigration Services

USCIS Proposes Significant Enhancements to EB-5 Visa Processing to Help America Win the Future

released May 19, 2011

Actions Will Streamline Program Designed to Create Jobs

WASHINGTON—U.S. Citizenship and Immigration Services (USCIS) today proposed significant enhancements to the administration of the USCIS Immigrant Investor Program, commonly referred to as the EB-5 Program—transforming the intake and review process for immigrant investors as part of the Obama administration's continued commitment to improve the legal immigration system and meet our economic and national security needs for the 21st century.

The EB-5 Program makes 10,000 visas available annually to immigrant investors who invest in commercial enterprises that create at least 10 U.S. jobs. EB-5 investors may petition independently or as part of a USCIS-designated Regional Center.

"Congress created the EB-5 Program in 1990 to attract investors and entrepreneurs from around the globe to create jobs in America," said USCIS Director Alejandro Mayorkas. "We are dedicated to enhancing this program to ensure that it achieves that goal to the fullest extent possible."

USCIS is proposing three fundamental changes to the way it processes EB-5 Regional Center filings. First, USCIS proposes to accelerate its processing of applications for job-creating projects that are fully developed and ready to be implemented. USCIS will also give these EB-5 applicants and petitioners the option to request Premium Processing Service, which guarantees processing within 15 calendar days for an additional fee.

Second, USCIS proposes the creation of new specialized intake teams with expertise in economic analysis and the EB-5 Program requirements. EB-5 Regional Center applicants will be able to communicate directly with the specialized intake teams via e-mail to streamline the resolution of issues and quickly address questions or needs related to their applications.

Third, USCIS proposes to convene an expert Decision Board to render decisions regarding EB-5 Regional Center applications. The Decision Board will be composed of an economist and adjudicators and will be supported by legal counsel.

This proposal will be online until June 17, 2011, for public comment—providing stakeholders an opportunity to offer feedback on the proposed changes to the administration of the EB-5 Program.

For more information on USCIS and its programs, please visit www.uscis.gov or follow us on Twitter (@uscis), YouTube (/uscis) and the USCIS blog The Beacon.

Last updated:05/19/2011

Plug-ins

Appendix 4

MEMORANDUM

TO: Alejandro N. Mayorkas, Director, USCIS
FROM: Carolyn Lee, Chair, AILA EB-5 Committee
DATE: December 21, 2012

RE: Realignment of EB-5 Adjudication

Thank you for holding *Conversations with the Director* earlier this month on EB-5 issues. As you can imagine, your announcement to move EB-5 adjudication from the California Service Center to a new EB-5 program office in Washington was dramatic. We thank you for this bold step toward improving EB-5 adjudication.

In response to your request for feedback during *Conversations*, we provide here four (4) specific recommendations and comments touching on:

(1) Adjudication of pending cases at the California Service Center
(2) Composition and qualifications of ideal EB-5 adjudicators
(3) Recommendations for the adjudication process
(4) Recommendations for an EB-5 Realignment Advisory Committee.

Adjudication of pending cases at the California Service Center.

According to the most recently published USCIS statistics, USCIS received 4,156 Form I-526 petitions in the first 3 quarters of FY 2012.[1] These statistics show that 3,777 of the 4,156 were decided, showing a "backlog" of 379 pending cases by end of Q3 FY 2012. Based on these usage rates, an additional 1,039 may have been receipted in Q4 FY 2012. Added to these cases and based on the Visa Office's estimates for increased EB-5 usage in FY 2013, there may have been as many as 2,296 Form I-526 petitions filed during Q1 FY 2013. Adding the backlog from Q3 FY 2012 (379) with the approximate number of cases filed in Q4 FY 2012 (1,039) and the estimated number of cases filed in Q1 FY 2013 (2,296), we have a total of 3,714 cases. Our clients and member attorneys report that I-526 petition adjudication has ground to a halt in the last six months. This means there may be as many as approximately 3,714 Form I-526 petitions pending at the CSC.

Applying the 8-year average approval rate of 81%, these petitions represent $1.5 billion that have yet to be released into our economy.

If you estimate roughly 10 jobs per approved petition, these petitions represent over 30,000 U.S. jobs. I note that economic impact analyses for regional center-based petitions typically include a 15-30% "buffer," so these petitions actually represent a greater job count.

[1] See http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/Upcoming%20National%20Engagement%20Pages/2012%20Events/July%202012/EB5_Statistics_Q3_2012.pdf

We can report from clients and members that as a result of these adjudication delays, projects have halted; developers have threatened litigation; municipalities are losing confidence in EB-5 funds; regional centers' reputations are being damaged; and investors are losing confidence in the program and its participants. As you noted during the December *Conversations*, these stuck petitions at the CSC are a "double emergency" and require immediate resolution.

We recommend that these pending cases be afforded operational priority, and that USCIS provide a statement about how pending cases will be handled during the transition as soon as possible.

Composition and qualifications of ideal EB-5 adjudicators.

Economists. USCIS economists must have real-world experience. We laud USCIS's acquisition of economists to support EB-5 adjudication, two of whom spoke during the June 22, 2012 engagement. We are hearing from experienced economists that USCIS economists' positions may be based on reasonable theory but not on application to real projects.

We recommend and ask that in addition to seeking economists with sound academic credentials, USCIS also seek economists with industry and/or public development experience. Economists with project experience will have context for assessing reasonableness of a particular economist's EB-5 impact analysis, based on professional experience as well as knowledge of industry standards applied by economists in the field.

Business Analysts. Similarly, USCIS must have analysts who can review business plans for feasibility based on real-world experience. USCIS examiners have begun applying unnecessarily rigid tests to assess business plan feasibility. For example, the CSC has recently required enterprises to have all licenses and permits in hand before the I-526 petition is filed. We will not go into here whether such a request comports with the AAO precedent decision *Matter of Ho*. Rather we use the example to show that such stringency would arise from lack of familiarity with construction projects as well as operational businesses, especially startups. EB-5 commercial enterprises must show USCIS that they have sufficiently considered what it takes for a business or project to be successful. At its heart, this is what *Matter of Ho* requires for a business plan to be sufficiently "comprehensive." USCIS must be able to discern true business risks from theoretical ones. Examiners with actual business experience will be better at that task than those without.

We recommend and ask that any business analysts hired to support EB-5 adjudication also be familiar with reviewing business plans describing construction projects of varying scales, startup businesses, as operational enterprises undergoing expansion or seeking working capital.

As a final note, we use the term "business analyst" in a general sense and do not express a bias for particular academic preparation. Real-world experience in running a business

or participating in management, or even advising in those activities, should be given more weight than any particular degree.

For other sources about relevant qualifications, you might consider:

- O*NET code 13-1111, Management Analysts[2]
- O*NET code 13-1161, Market Research Analysts and Marketing Specialists[3]
- Stanford University, Center for Professional Development description of some business analyst tasks.[4]

Examiners. Fundamentally, EB-5 examiners need one thing: support for their work. We believe that the EB-5 program can achieve the potential Congress intended with sustained support from the Director and the Program Offices and Directorates within USCIS affecting EB-5 adjudication. We commend you for clearly signaling a strong belief in the EB-5 program's positive potential. This belief if fostered within the larger agency can give EB-5 examiners a positive sense of their mission. This is critical to their success and therefore the success of the program.

Applying this principle, examiners need regular training. The EB-5 program can proceed either as one holding rigid bounds or one accommodating variety. The static model simplifies adjudication by limiting the need of the examiner to address the many variables encountered in different business models. We would say that the adaptive model conforms to Congressional intent because it fosters a reasonable review of real-world variety and thereby allows more capital flow toward job creation. The challenges of an adaptive program include difficulty training examiners on applying guidance to new forms of enterprise. It requires sustained dedication of resources to examine emerging trends, elevate certain issues for treatment at the policy level, promulgate guidance, and to regularly train examiners. We recommend that such a management structure be built into the EB-5 program office.

Another important application of examiner support is limiting the scope of their review. First-line adjudicators should not be required to review economist methodology and pass on its reasonableness. Similarly, they should not be required to analyze the distribution mechanics under a limited partnership agreement for redemptive features. These highly technical questions should be adjudicated by subject matter experts within the EB-5 program office. Ideally, these questions should be pre-adjudicated in the Form I-924 project preapproval amendment context for regional center-based cases by these subject matter experts. We discuss the importance of this preapproval process more below, in tandem with a discussion on bifurcating adjudication functions.

We recommend that examiners' scope of review be limited to investor-specific aspects of adjudication, including lawful source of funds, national security, and fraud. Assuming

[2] http://www.onetonline.org/find/result?s=business+analyst&g=Go
[3] Id.
[4] See http://scpd.stanford.edu/ppc/business-analysis-courses.jsp?_vsrefdom=Adwords-SDRM&_s_ref=tgfY4182S&kw=%22business%20risk%20management%22&creative=9488173941

that USCIS adopts bifurcated adjudication, examiners do not need preparation beyond what USCIS currently would require for examiners in the H, L, E, other employment-based immigrant visa petition adjudication. Discretely defining first-line examiner functions facilitates hiring and adjudication consistency.

Recommendations for the adjudication process.

We must seize on the Form I-924 regional center project preapproval amendment as the most important adjudication tool.

Related and as touched upon above, EB-5 adjudication should be bifurcated. The benefits of bifurcated adjudication include greater uniformity and faster specialized processing.

Project team. One team of subject matter experts should be dedicated to reviewing regional center new commercial enterprise eligibility. By new commercial enterprise eligibility, we mean all aspects of regional center project review including investment structure and job creation. The project team concept is similar to the "Specialized Intake Team" contemplated in your *Proposed Changes to USCIS's Processing of EB-5 Cases* posted May 19, 2011, attached. The project team would adjudicate all Forms I-924 for initial regional center proposals; regional center designation amendments; and project preapproval amendments. This team would also adjudicate the job creation portion of regional center-based Forms I-829.

The project adjudicators should issue requests for evidence, notices of intent to deny, and approvals on Forms I-924. Preapprovals (I-924 amendments for project preapproval) should be issued on Form I-797 approval notices with instructions to attach the Form I-797 to related I-526 petitions.

Investor team. The second team of adjudicators should be dedicated to examining all aspects of eligibility on the investor side, including lawful source of funds, national security, and fraud. To the extent that investor adjustment applications and associated work and travel applications will also be adjudicated by the EB-5 program office, the investor adjudicators would adjudicate those benefits as well.

Expedited processing of Form I-924 preapproval amendments is essential. Deference afforded to I-526 petitions associated with preapproval amendments is likewise essential. USCIS should afford deference barring a major change in circumstances from the facts on record with the preapproval amendment. Expedited processing will reduce likelihood of major changes between I-924 preapproval amendment and I-526 filing. Speed in deciding project eligibility is important to promoters, developers, and investors in providing a "green light" for associated I-526 petitions. Most regional centers place investor funds in escrow until I-526 approval per current market expectations. The 12+ month processing time for I-924 preapproval amendments plus the 8-month processing time for I-526s before escrow release together present unworkable delays to shovel-ready projects. Sampled regional centers report a willingness to pay an expedite fee between

$10,000 to $50,000 for preapproval that will be adjudicated within 30 days as long as USCIS will accord reasonable deference to associated I-526 petitions.

Your proposed memorandum, *Proposed Changes to USCIS's Processing of EB-5 Cases* is an excellent starting point on processing Form I-924s. Please see our Committee's comments to that memorandum, attached.

Recommendations for an EB-5 Realignment Advisory Committee.

With the bold transition USCIS is about to undertake, we recommend that USCIS make use of the legal expertise and experience of AILA EB-5 Committee members.

The Federal Advisory Committee Act (FACA) permits federal agencies to sponsor advisory committees to lend outside expertise while also affording private participation in government decisions. While we have not studied FACA in depth, we believe that this law may provide authority for USCIS to solicit the expertise of the AILA EB-5 Committee, or even certain committee members, along with other respected industry actors to assist USCIS in its realignment effort.

Alternatively or in the interim, we recommend that you consider convening a more informal transition committee. We invite you to select our Committee or any of our members to participate.

The realignment is an opportunity, as you likely envisioned, for rebuilding the foundations of EB-5 adjudication. Such an endeavor is appropriately if not necessarily supported by dedicated outside experts with demonstrated depth of knowledge in the EB-5 area.

We close by echoing our opening congratulations. Realignment is itself an entrepreneurial approach to enhancing EB-5 adjudication. We urge USCIS to promulgate the next draft of the iterative Policy Memorandum in tandem with realignment efforts. Comprehensive substantive guidance must be harmonized with process reorganization and rebuilding.

To that end, we attach our Committee's comments dated January 21, 2011 to the USCIS memorandum dated December 11, 2009. These comments contain detailed recommendations regarding the "material change" policy among others. We also attach our Committee's comments dated December 9, 2011 to the draft Policy Memorandum. Many of our recommendations were reflected in the subsequent draft memorandum posted January 11, 2012 for which we thank you. However, some key recommendations were declined. We recommend and ask that USCIS reconsider the declined recommendations, particularly those regarding bridge financing (item 11), clarification of "direct" vs. "indirect" jobs (item 16), and retracting reference to *Matter of Katigbak* as authority for the "material change" policy (item 18).

There are other substantive priorities with which to engage you later in the year. These include the troubling adjudicative trend in the use of NAICS codes; clarifying timeframe for enabling "direct" construction job count; and responses to our questions and comments to USCIS economists submitted to the Office of Public Engagement on July 20, 2012, also attached. It would be appropriate use of a newly-convened EB-5 Realignment Advisory Committee, or a more informal one, to tackle these substantive issues as well.

Thank you, Ali.

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PROPOSAL FOR COMMENT
Posted: 05-19-2011
Comment period ends: 06-17-2011

Proposed Changes to USCIS's Processing of EB-5 Cases

Congress created the EB-5 Immigrant Investor Program in 1990 to create jobs and spur investment in the United States. The EB-5 program is available to prospective immigrants who invest in a new commercial enterprise that will create at least 10 full-time jobs in the United States. EB-5 investors may petition to participate either on their own or under a USCIS-designated "Regional Center." Regional Centers are public or private entities that promote economic growth, regional productivity, job creation, and capital investment. USCIS accepts petitions for interested investors on Form I-526 and applications for Regional Center designation on Form I-924.

Proposals submitted under the EB-5 Program are often complex, involving business plans supported by expert analyses evidencing that the EB-5 Program's legal criteria are met. The proposed steps outlined below respond to concerns stakeholders and petitioners have raised about the often-complex EB-5 proposal process and reflect USCIS's long-term commitment to realizing the EB-5 Program's fullest job-creation potential and to addressing stakeholder concerns about process challenges.

Background

Regional Centers submit I-924 applications in one of two varieties. First, "actual" applications present "shovel-ready" business projects that are sufficiently developed to support the immediate filing of actual I-526 petitions from participating investors. "Actual" applications are supported by specific business plans and economic analysis, the actual capital-investment structures and documentation for the investment offering, the anticipated regional economic impacts, and the Regional Center's operating plan and structure. The review of the specific documentation to be provided in I-526 petitions for projects that can be started immediately after the approval of the I-924 application promotes efficiency and predictability within the EB-5 immigrant petitioning process as issues can be identified and resolved within the I-924 application prior to the filing of any I-526 petitions. Second, "exemplar" applications present feasible business projects that are not yet "shovel ready," together with an exemplar I-526 petition, for a preliminary determination of EB-5 compliance. The "exemplar" process allows Regional Centers to seek approval of new, job-creating projects in principle before the business projects are fully developed to the point where participating investors can submit their I-526 petitions.

Proposed Step 1: Accelerated and Premium Processing of "Shovel-Ready" Cases

USCIS proposes to prioritize "actual" I-924 applications to ensure that eligible, shovel-ready business projects get underway as quickly as possible. First, we will offer accelerated target processing times for "actual" Regional Center filings. Second, we will make "actual" I-924 application Regional Center filings eligible for the USCIS Premium Processing Service (PPS). (PPS offers 15-day turnaround and enhanced customer service for an additional fee.) Clear filing guidelines for "actual" vs. "exemplar" I-924 applications and I-526 petitions will be provided to the public through a revised I-924 application, I-526 petition, and instructions for these forms. I-924 applications including a hybrid of "shovel-ready" and "exemplar" documentation will be

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accepted for processing as "exemplar" applications. Third, accelerated target processing times will also apply to the I-526 petitions associated with approved "actual" I-924 applications, and PPS will be available for those petitions as well. Prioritizing shovel-ready cases will also create a strong incentive for the public to file clear, focused applications and petitions.

The following target processing times will apply both to initial and amended I-924 applications and EB-5 petitions:

Case Type	Current Target Processing Time	Actual Processing Time	Proposed Target Processing Time
I-924 – "Actual" (Shovel-Ready) Project	4 Months	5 Months	2 Months
I-924 – "Actual" (Shovel-Ready) Project – *Premium*	N/A	N/A	15 Days
I-924 – "Exemplar" Project	4 Months	5 Months	5 Months
I-526 – RC "Actual" (Shovel-Ready) Project	5 Months	6 Months	2 Months
I-526 – RC "Actual" (Shovel-Ready) Project – *Premium*	N/A	N/A	15 Days
I-526 – Regional Center "Exemplar" Project	5 Months	6 Months	5 Months
I-526 – Not Affiliated with a Regional Center	5 Months	6 Months	5 Months
I-829	6 Months	5 Months	3 Months

Proposed Step 2: Specialized Intake Teams for I-924 Applications, with Direct Customer Access

USCIS proposes to create Specialized Intake Teams to handle the initial intake and review of I-924 applications. The teams will have expertise in economic development and analysis, as well as EB-5 Program requirements. Members will include USCIS economists, business analysts, and adjudicators, and each team will be supported by legal counsel.

The intake teams will determine if an I-924 application filed as an "actual" application meets the "actual" filing guidelines, and will work to ensure that each "actual" or "exemplar" I-924 application package is ready for adjudication. The teams will review the package for all required documentation and evidence and communicate directly with the I-924 applicant in writing to address identified questions or needs.

Proposed Step 3: Enhanced Decision Process for I-924 Applications, with Option for In-Person or Telephonic Interview

USCIS proposes to have an expert I-924 Decision Board render decisions in I-924 applications. The Board will be composed of a USCIS economist and two USCIS adjudicators, and will be

supported by legal counsel. The Board will receive a case for disposition from the Specialized Intake Team, and the Board's first step in each case will be to approve the I-924, to route the I-924 back to the intake team for a Request for Evidence ("RFE"), or to issue the applicant a Notice of Intent to Deny ("NOID"). If the Board issues a NOID, it will offer the applicant the opportunity to have an in-person or a telephonic interview with the Board to inform its final decision. If an applicant believes an RFE has been issued unnecessarily and the application is ready for adjudication, the applicant can request the issuance of a NOID for the purpose of obtaining an interview. The Board will audiotape or otherwise memorialize the interviews for the record. The Board will then ultimately approve or deny the I-924. I-924 approval letters will clearly identify whether the case was approved as an "actual" or "exemplar" application. Business plans, economic analysis, and I-526 documentation approved in an "actual" I-924 application, if unchanged, will be given deference in the filing of associated I-526 petitions, and such petitions will be eligible for accelerated target processing times and for PPS.